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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

vs.

GAUDIYA VAISHNAVA SOCIETY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a local ordinance is void on its face under the First Amendment because the ordinance imposes a permit requirement on sidewalk vendors who attach noncommercial messages to the food and merchandise they sell.

2. Whether this Court's charitable fundraising decisions confer upon nonprofit organizations a First Amendment right to sell message-bearing commercial goods on public sidewalks without abiding by permit requirements that apply to all other sidewalk vendors.

3. Whether a federal court exceeds its power under Federal Rule of Civil Procedure 65(d) by issuing an injunction that requires municipal officials enforcing a local ordinance to decide, under threat of contempt, whether merchandise being sold by nonprofit organizations "is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message."

LIST OF ALL PARTIES

The parties to the proceedings in the Ninth Circuit Court of Appeals were petitioner City and County of San Francisco, a municipal corporation and a political subdivision of the State of California, and respondents Gaudiya Vaishnava Society, Greenpeace Pacific-Southwest, Inc., San Francisco Nuclear Weapons Freeze Campaign, San Francisco CISPES ("Committee in Solidarity with the People of El Salvador"), and San Francisco Lesbian-Gay Freedom Day Parade.

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PETITION FOR WRIT OF CERTIORARI

Petitioner City and County of San Francisco ("City") respectfully prays that a Writ of Certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, modifying the district court's injunction and denying the petition for rehearing,

is reported at 952 F.2d 1059, and is reprinted in Appendix A of this petition, p. A-1.

The original opinion of the United States Court of Appeals for the Ninth Circuit is reported at 900 F.2d 1369, and is reprinted in Appendix B of this petition, p. A-18.

The unreported findings of fact and conclusions of law and judgment issued by the United States District Court, Northern District of California (Schwarzer, J.), are reprinted in Appendix C of this petition, p. A-32.

JURISDICTION

The district court's jurisdiction was based on 28 U.S.C. sections 1331 and 1343(a)(3). On March 21, 1988, the district court issued its findings of fact and conclusions of law and its judgment granting respondents a permanent injunction. See App. C, p. A-32, *infra*.

On April 10, 1990, the Ninth Circuit entered a decision modifying the district court's injunction. See App. B, p. A-18, *infra*. The Ninth Circuit had jurisdiction under 28 U.S.C. section 1291 because petitioner appealed from an order issuing a permanent injunction.

On December 26, 1991, the Ninth Circuit issued an amended opinion and denied petitioner's request for rehearing. See App. A, p. A-1, *infra*.

This Court has jurisdiction to review the judgment of the Ninth Circuit under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Article 9.6, section 660.2(j) of the San Francisco Police Code, set forth in Appendix D, p. A-42, provides as follows:

> No individual shall engage in sales solicitations for charitable purposes by means of selling clothing, jewelry, or any other goods, products, services or merchandise in any areas of the City and County of San Francisco unless that person obtains the appropriate peddling permit pursuant to Article 13, 17.3 or 24 of the San Francisco Police Code. This Section shall not apply to the sale of books, pamphlets, buttons, bumperstickers, posters or any other type of item that has no intrinsic value or purpose other than to communicate a message.

3. Article 13, sections 869 *et seq.*, of the San Francisco Police Code, require all persons selling "goods, wares or merchandise" to obtain a site-specific peddler's permit; the permittee may not locate within a specified distance of an established business selling the same merchandise. These ordinances are set forth in Appendix E, p. A-50.

4. Article 17.3, sections 1330 *et seq.*, of the San Francisco Police Code, establish a similar scheme for persons seeking to sell food on the public sidewalks. These ordinances are set forth in Appendix F, p. A-61.

5. Article 24, sections 2400 *et seq.*, of the San Francisco Police Code, require "street artists" seeking to sell items of their own making on the sidewalks to first obtain a permit. These ordinances are set forth in Appendix G, p. A-72.

6. Rule 65(d) of the Federal Rules of Civil Procedure provides as follows:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

STATEMENT OF THE CASE

At stake in this case is the power of local governments to control commercial sales on public sidewalks. The Ninth Circuit ruling below invalidates on its face a San Francisco ordinance that requires a permit of all street vendors, including vendors acting on behalf of nonprofit organizations that sell clothing, food or tourist memorabilia with messages attached to them. In essence, the Ninth Circuit's opinion turns the First Amendment into a commercial sword; nonprofit vendors may wield that sword to strike down content-neutral regulations and thereby obtain a competitive advantage over for-profit sellers of virtually identical goods that do not bear such messages.

In reaching this conclusion, the Ninth Circuit committed a series of legal errors. First, the court unjustifiably broadened the scope of this Court's decisions elucidating the First Amendment rights of charitable fundraisers. Second, the court misapplied the test established in *United States v. O'Brien*, 391 U.S. 367 (1968), ignoring this Court's admonition that *O'Brien* does not impose a "least restrictive means" test on government regulations having an incidental impact on expressive conduct. And third, the Ninth Circuit unreasonably expanded the reach of this Court's decision in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). Under the Ninth Circuit's reading of *Lakewood*, scores of municipal laws would be *facially* invalid because they might incidentally and infrequently regulate expressive activity.

The practical effect of the Ninth Circuit's legal errors is dramatic. The decision has empowered nonprofit organizations, or those acting in their name, literally to set up shop on public sidewalks. In this case, after the trial court issued an injunction holding that nonprofit organizations selling message-bearing merchandise are entitled to full First Amendment protection, "charitable" merchants appeared in droves on the streets of San Francisco, especially in tourist areas. Nonprofit groups began selling items such as sweatshirts depicting the Golden Gate Bridge and the San Francisco skyline with the message "Make San Francisco Karma Free" in the finest of print; scarves bearing tiny removable ribbons containing Biblical quotations; teddy bears with similar ribbons tied around their necks; and even bananas bearing the imprint "Karma Free".

Article 9.6 of the San Francisco Police Code, which regulates activities of charitable fundraisers on sidewalks, embodies San Francisco's recognition that charitable organizations have a right to solicit *contributions* for their cause. Article 9.6 is not at issue in this case, with the exception of section 660.2(j). That section applies only when a charitable organization seeks to raise funds through the *sale* of goods and merchandise. Section 660.2(j) requires individuals who seek to sell goods and merchandise on behalf of charitable organizations to comply with the same peddling laws applied to other merchants selling the same types of goods.[1]

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[1] Section 660.2(j), a copy of which is set forth in Appendix D, p. A-42, provides:

(Continued on following page)

Significantly, section 660.2(j) extends a special exemption to charitable organizations that the City does not afford to other merchants. An individual who seeks to sell merchandise for a charitable organization need not obtain a peddling permit before selling "books, pamphlets, buttons, bumperstickers, posters and any other type of item that has no intrinsic purpose or value other than to communicate a message."[2] On the other hand, the

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> No individual shall engage in sales solicitations for charitable purposes by means of selling clothing, jewelry, or any other goods, products, services or merchandise in any areas of the City and County of San Francisco unless that person obtains the appropriate peddling permit pursuant to Articles 13, 17.3 or 24 of the San Francisco Police Code. This Section shall not apply to the sale of books, pamphlets, buttons, bumperstickers, posters or any other type of item that has no intrinsic value or purpose other than to communicate a message.

Article 13, sections 869 *et seq.*, require all persons selling "goods, wares or merchandise" to obtain a site-specific peddler's permit; the permittee may not locate within a specified distance of an established business selling the same merchandise. These ordinances are set forth in Appendix E, p. A-50.

Article 17.3, sections 1330 *et seq.*, establish a similar scheme for persons seeking to sell food on the public sidewalks. These ordinances are set forth in Appendix F, p. A-61.

Article 24, sections 2400 *et seq.*, require "street artists" seeking to sell items of their own making on the sidewalks to first obtain a permit. These ordinances are set forth in Appendix G, p. A-72.

[2] These items are referred to generally throughout this brief as "expressive items."

sale of merchandise that has value other than to communicate – a shirt or a toy, for example – is subject to the City's peddling laws, regardless of any message appended to it.

In a facial challenge to section 660.2(j), the Ninth Circuit held that the peddling permit laws were an invalid licensing of protected expression. The Ninth Circuit modified the district court's injunction so that the City is enjoined from enforcing section 660.2(j)

> against plaintiffs or any other nonprofit organization or person acting for it, with respect to the sale of merchandise which is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message.

App. A, p. A-17. For the following reasons, this petition should be granted.

First, the First Amendment does not confer a right to sell on the public sidewalks the types of merchandise covered by section 660.2(j). The Ninth Circuit wrongly analogized merchandising by charitable organizations to fundraising. The First Amendment protects a charitable organization's solicitation of funds because persuasive speech is inherent in the solicitation. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) and *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). But persuasive speech does not play the same inherent role when the transaction at issue is the purchase of a sweatshirt or a scarf at a bargain price from a street vendor who literally does not have to pay the rent. See fn. 10, *infra*.

Second, even if commercial sales by charitable organizations have some expressive component, the appropriate standard for evaluating the City's regulation is set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The Ninth Circuit misapplied *O'Brien*, which establishes a four-part test to be applied to government regulations having an incidental impact on expressive activity. Under the *O'Brien* test, the City's ordinance is valid because (1) the City has the power to regulate the sale of merchandise on city sidewalks; (2) the City has a substantial interest in regulating this activity; (3) the City's interest is unrelated to the suppression of free expression; and (4) the City's permit system is sufficiently narrowly tailored.

The Ninth Circuit's original decision did not mention *O'Brien*. 900 F.2d 1369 (9th Cir. 1990); App. B, p. A-18. Its modified decision acknowledged that if *O'Brien* applied to this case, the City's regulations passed the first three prongs of *O'Brien*'s test. 952 F.2d 1059, 1065 (9th Cir. 1992); App. A, p. A-14. In holding that the City's statutory system failed the fourth prong of *O'Brien*'s test, the Ninth Circuit applied a "least restrictive means" analysis that this Court has expressly disapproved.

Third, in striking down section 660.2(j) *on its face*, the Ninth Circuit failed to distinguish between licensing schemes directed at expression and those that are directed at activities that only infrequently and incidentally involve an expressive element. Consequently, the opinion dramatically expands this Court's holding in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). Taken to its logical conclusion, the Ninth Circuit's

opinion means that any municipal permit scheme of general application that may occasionally touch on an activity that has an expressive component is void if it vests discretion in administrative officials. For example, a law vesting officials with discretion to grant building permits would be facially invalid because it could apply to the construction or alteration of theaters or book stores.

Fourth, the standard established in the Ninth Circuit's injunction constitutes an impermissible exercise of federal judicial power. The injunction does not inform city officials what merchandise is protected by the First Amendment, and leaves officers guessing, under penalty of contempt, as to whether a particular item of merchandise is "inextricably intertwined" with a statement on the merchandise carrying a message.

Finally, as the Ninth Circuit observed, this case presents a constitutional question "of first impression for the courts of appeals." App. A, p. A-9. The issues raised by this case, and unsatisfactorily resolved by the Ninth Circuit, are of paramount importance to states and municipalities seeking to (1) preserve sidewalks as paths for pedestrian travel; (2) protect sidewalks from deteriorating into bazaars and roving flea markets; and (3) protect local merchants from unfair competition. Because this case involves significant and unresolved questions under the First Amendment, this petition should be granted.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT ERRED IN HOLDING THAT THE SALE OF MERCHANDISE, OTHER THAN BOOKS AND SIMILAR PURELY COMMUNICATIVE MERCHANDISE, IS ANALOGOUS TO CHARITABLE SOLICITATION AND THEREFORE ENTITLED TO FIRST AMENDMENT PROTECTION.

The Ninth Circuit held that "[w]here the pure speech and commercial speech . . . [are] inextricably intertwined, the entirety must be classified as noncommercial and we must apply the test for fully protected speech." App. A, p. A-13. The court relied upon *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) and *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).[3] Under the Ninth Circuit's analysis, this Court's decisions protecting the First Amendment rights of charitable organizations to solicit contributions have been extended to protect the hawking of tourist garments, jewelry, stuffed animals and fresh fruit.

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[3] The City's permit system regulates commercial transactions; it does not regulate advertising or other "speech which does 'no more than propose a commercial transaction.' " *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983), *quoting, Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). For this reason, the City's permit system does not implicate this Court's "commercial speech" cases. Neither the parties below, nor the Ninth Circuit, considered this case to raise issues relating to regulation of commercial speech.

This unprecedented extension is unwarranted. Neither *Riley* nor *Schaumburg* involved laws of general application regulating the sale of commercial merchandise. Rather, those cases reviewed laws that specifically regulated the solicitation of voluntary donations. In both cases, this Court reasoned that such fundraising by charitable organizations "is characteristically intertwined" with "persuasive speech seeking support for particular causes. . . . " *Schaumburg*, 444 U.S. at 632; *see Riley*, 487 U.S. at 788.[4] "Canvassers in such contexts are necessarily more than solicitors for money." *Schaumburg*, 444 U.S. at 632.

That reasoning does not apply here. A charitable organization must engage in persuasive speech to obtain voluntary contributions. However, a vendor need not engage in persuasive political, religious or philosophical speech to sell a tourist t-shirt or a message-bearing piece of fruit. Clerk's Record in Court of Appeals ("CR") 16, 87.

The facts of this case are much closer to those of *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). *Fox* involved a challenge to a law prohibiting private commercial enterprises from demonstrating and selling housewares in student dormitories through "Tupperware parties." This Court rejected the vendor's argument that its discussion of financial

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[4] *See also, Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 959 (1984) (explaining that *Schaumburg* held that "charitable solicitations are . . . entitled to the protection of the First Amendment" because they "are so intertwined with speech.")

responsibility, home economics and related subjects accompanying its sales pitch brought its activities under the mantle of the First Amendment:

> [T]hese home economic elements no more converted AFS's presentations into educational speech than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. . . . Advertising which 'links a product to a current debate' is not thereby entitled to the constitutional protection afforded noncommercial speech.

Fox, supra, 492 U.S. at 474-75.

The cynical conduct described in *Fox* – linking a product to a current debate in order to cloak a sale in First Amendment protection – is *exactly* what is involved in this case. Charitable organizations recognize the financial opportunities presented by the unregulated sales on public sidewalks. Especially in tourist areas such as San Francisco's Fisherman's Wharf, peddling sweatshirts depicting the San Francisco skyline and popular beer logos can be very lucrative.[5] By appending camouflaged

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[5] As the photographs in the record clearly illustrate (CR 87 and Appendix I thereto), nonprofits would sell shirts strikingly similar to those being sold in nearby shops, but at a discount made possible by the nonprofits' lower operating costs. For example, a tourist shop was selling a shirt containing the Corona Beer symbol: a yellow pentagon within which appeared the logo "Corona Extra" and the words "Las Cerveza Mas Fina" and "Imported Beer From Mexico." Below the pentagon were the words "San Francisco." Nearby, a non-profit group whose identified purposes were to fight racism and

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messages to their merchandise, these nonprofit organizations have exploited a commercial advantage conferred on them by the rulings below. CR 87.

The record and procedural history in this case make this point clear.[6] The trial court issued an injunction restraining the City from enforcing its peddling ordinances against organizations selling merchandise "constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the plaintiff's organization." Before the trial court's order, few if any of the items of merchandise being sold by nonprofits bore any message at all. CR 13, 15, 16, and 20. Rather, the charitable organizations claimed that they had an absolute First Amendment right to raise funds through the sale of goods. Only after the trial court's order did the sale of "message-bearing" items proliferate. Vendors discovered that appending a message to commercial merchandise would exempt them from the City's peddling laws. CR 15, 16 and 87.

Under this Court's holding in *Fox*, attaching a message to merchandise such as sweatshirts no more converts their sale into protected speech than the pledging of

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drug abuse sold shirts of indistinguishable design. On the front, in typeface of the same size and style as the Corona beer shirt, are the words "Corona Beach Club" and "La Playa Mas Fina" within a virtually identical yellow pentagon. Under the pentagon appear the words "San Francisco" and in much smaller letters the phrase "One City for All People."

[6] A more complete discussion of the procedural history is contained in the Ninth Circuit's modified opinion, App. A, pp. A-3 – A-6.

allegiance by the vendor would convert a sales pitch into political speech. This petition should be granted so that this Court can clarify this critical distinction between charitable fundraising and merchandising, and reaffirm the fundamental right of a public entity to regulate merchants on public sidewalks.

II. THE NINTH CIRCUIT MISAPPLIED THE FOURTH FACTOR OF THE *O'BRIEN* TEST BY USING A "LEAST RESTRICTIVE ALTERNATIVE" ANALYSIS THIS COURT HAS EXPLICITLY REJECTED.

At most, merchandising by charitable organizations is conduct that incidentally includes expression. The standard for reviewing state and local regulations of such conduct is established in *United States v. O'Brien*, 391 U.S. 367 (1968). Had the Ninth Circuit properly applied *O'Brien*, the court would have upheld the City's permit system.

A. If Merchandising Implicates The First Amendment, Then The *O'Brien* Test Should Be Used To Evaluate San Francisco's Ordinance.

In *O'Brien*, this Court articulated the following test for determining the validity of a statute that has only an incidental effect on expressive conduct:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to

> the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.[7]

San Francisco's peddling ordinances apply to all street sales of merchandise. Section 660.2(j) contains nothing in addition to or different from these laws. Rather, it merely makes clear that individuals wishing to sell merchandise (other than expressive items) in the name of a nonprofit organization must obtain the same peddling permit that is required of any other sidewalk vendor. The peddling permit system is one of general application addressing business activities that ordinarily have no expressive component. Thus, assuming that merchandising by a nonprofit organization can be considered expressive activity, the ordinance only incidentally affects such

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[7] In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-879 (1990), this Court employed a similar standard in rejecting a Free Exercise Clause challenge to a criminal statute prohibiting the possession of peyote, explaining:

> We have never held that an individual's religious belief excuses him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. . . . ¶ Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." [Citation.]

activity. Accordingly, this case is governed squarely by *O'Brien*.

The Ninth Circuit stated that *O'Brien* did not apply because rather than involving expressive conduct, "[t]his case . . . requires us to examine whether the commercial and pure elements of speech are inextricably intertwined." App. A, p. A-14, *citing*, *Riley*, 487 U.S. 781 (1988), and *Fox*, 492 U.S. 469 (1989). The Ninth Circuit simply ignored the fundamental differences between the ordinance in this case and the laws examined in *Riley* and *Fox*. In those cases, the government sought to regulate speech itself: fundraising in *Riley*, speech by commercial enterprises in *Fox*. Here, by contrast, San Francisco seeks to regulate conduct (*i.e.*, the sale of merchandise), which may occasionally have an expressive component.

In addition, the laws examined in *Riley* and *Fox* both *prohibited* certain speech. Here, by contrast, San Francisco's permit system does not prohibit the sale of merchandise; the ordinance merely requires that an individual obtain a permit before engaging in that conduct.[8]

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[8] Also, the Ninth Circuit misconceived *Riley's* "inextricably intertwined" standard. As this Court made clear in *Fox*, that standard applies to situations in which the state *compels* certain commercial speech (*e.g.*, disclaimers), resulting in the compelled speech being "inextricably intertwined" with other speech. In *Fox*, this Court stated that the "inextricably intertwined" test did not apply to a regulation prohibiting commercial sales on a college campus, even when the sales were combined with educational speech:

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Because the ordinance, at most, has only an incidental impact on expressive conduct, the *O'Brien* test clearly applies to this case.

B. San Francisco's Ordinance Easily Passes Each Of The Four Prongs Of The *O'Brien* Test.

The Ninth Circuit recognized that if *O'Brien* applied, San Francisco's peddling ordinance satisfies the first three prongs of the *O'Brien* test:

> [The ordinance] is within the constitutional power of the city. It protects important governmental interests in avoiding clutter and promoting the aesthetic appearance of the city. These interests are not related to communication.

App. A, pp. A-14 – A-15. However, the court misapplied the fourth prong of the test, apparently reading *O'Brien* to

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> [T]here is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the Resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

492 U.S. at 474. Similarly, San Francisco's ordinance does not compel nonprofits to combine their sales of sweatshirts with noncommercial messages, and "nothing in the nature of things" requires that they be so combined.

require that the City's permit system be the least restrictive means of furthering the City's interests:

> In the present case rules that give guidance to the chief of police would be compatible with the city's interests. No need for unbridled discretion in the chief exists. The ordinance fails to meet the standards set by *O'Brien*.

Id.[9]

The court's reasoning and conclusion do not withstand analysis. The Ninth Circuit did *not* hold that the City's permit system failed to further the City's interests. Rather, the court offered what it considered to be a better way for the City to accomplish its goals. The Ninth Circuit thereby applied the fourth prong of the *O'Brien* test in a manner disapproved of by this Court. In *United States v. Albertini*, 472 U.S. 675, 689 (1985), this Court described the fourth prong of the *O'Brien* test as follows:

> [A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. . . . The validity of such regulations

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[9] In raising the issue of "unbridled discretion," the Ninth Circuit linked the fourth *O'Brien* factor with this Court's examination in *City of Lakewood* of regulations "aimed at conduct commonly associated with expression." As discussed in the following section, *Lakewood's* "unbridled discretion" analysis is simply not applicable to a content-neutral permit scheme of general application, such as the one in this case.

> does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.

Albertini, 472 U.S. at 688-89; *see also, Ward v. Rock Against Racism*, 491 U.S. 781, 797-98 (1989) (holding that the court of appeals erred in "sifting through all the available or imagined alternative[s] . . . to determine whether the city's solution was 'the least intrusive means' of achieving the desired end"); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 297-299 (1984). Similarly, the decision in *Fox* directs courts to defer to local governments in their choices of how best to achieve legitimate governmental objectives: "[W]e have been loath to second-guess the Government's judgment to that effect." *Fox*, 492 U.S. at 478.

Under a proper application of *O'Brien*, the City's permit scheme easily passes First Amendment muster. The City's substantial interests in fighting visual clutter and protecting public safety and local commerce "would be achieved less effectively absent the [City's ordinance]." *Albertini*, 472 U.S. at 689. That ordinance enables the City carefully to control the number and location of vendors plying their trades on the public sidewalks. The permit system prohibits peddlers from locating near businesses that sell the same merchandise, protecting such businesses from the unfair price competition of merchants who pay no rent.[10] The regulations also grant the

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[10] As the Ninth Circuit recognized, "Because of overhead costs associated with maintaining a storefront, the local merchants complained that the nonprofits are able to discount the

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City discretion in determining the number of vendors that should be permitted in a particular area, thereby enabling the City to distribute vendor locations in a way that minimizes visual clutter and the risk to public safety.

In sum, to the extent the sale of merchandise on behalf of charitable organizations is entitled to First Amendment protection, *O'Brien* squarely controls this case. The City's peddling permit system easily meets the four-part *O'Brien* test. Because the Ninth Circuit misapplied this test, the petition should be granted.

III. THE NINTH CIRCUIT'S OPINION MISAPPLIES AND EXPANDS THIS COURT'S HOLDING IN *CITY OF LAKEWOOD v. PLAIN DEALER PUBLISHING CO.*

The Ninth Circuit held that section 660.2(j) was unconstitutional *on its face* because it is part of a statutory scheme that invests San Francisco's Police Chief with the discretion to grant permits for peddling merchandise on the public sidewalks. App. A, p. A-15. In reaching this conclusion, the Ninth Circuit relied heavily upon *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (4-3 decision, Chief Justice Rehnquist and Justice Kennedy not participating.)[11] *Lakewood* does not apply to this

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(Continued from previous page)

price of similar merchandise like T-shirts by as much as 33%." App. A, p. A-4, n.2.

[11] In addition, the Ninth Circuit initially relied on *Lakewood* for its conclusion that section 660.2(j) may be challenged on its face. App. A, pp. A-7 – A-8.

case because the City's laws are not "directed narrowly and specifically at expression." 486 U.S. at 760. The Ninth Circuit's extension of the facial challenge doctrine is contrary to this Court's First Amendment decisions.

The *Lakewood* majority identified two features of the ordinance which, "at least in combination," made the ordinance susceptible to a facial challenge:

> First, Lakewood's ordinance requires that the Newspaper apply annually for newsrack licenses. . . . While perhaps not as direct a threat to speech as a regulation allowing a licensor to view the actual content of the speech to be licensed or permitted . . . a multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern. ¶ A second feature of the licensing system at issue here is that it is directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers.

486 U.S. at 759-60.

Here, neither of those factors is present. First, while sidewalk peddlers pay annual fees, none of the City's permit laws requires permittees to reapply periodically. Accordingly, the type of "multiple licensing requirement" that concerned the *Lakewood* majority is missing here.

Second, and more significantly, San Francisco's peddling permit system is not "directed narrowly and specifically at expression or conduct commonly associated with expression," such as the circulation of newspapers at issue in *Lakewood*. 486 U.S. at 760. Rather, the ordinances here are laws of general application that regulate all merchandising with one notable exception. Charitable

organizations need *not* obtain a peddler's permit to sell "books, pamphlets, buttons, bumperstickers, posters or any other type of item that has no intrinsic value or purpose other than to communicate a message." Only the sale of merchandise not commonly associated with protected expression is regulated by these ordinances. Since neither of the factors motivating this Court to entertain a facial challenge to the local ordinances in *Lakewood* is present here, the Ninth Circuit erred in relying upon *Lakewood*.

Indeed, the *Lakewood* majority explained that laws of general application such as those at issue here do not pose the type of First Amendment threat justifying a facial challenge:

> In contrast to the type of law at issue in this case, laws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship. For example, a law requiring building permits is rarely effective as a means of censorship. To be sure, on rare occasion an opportunity for censorship will exist, such as when an unpopular newspaper seeks to build a new plant. But *such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse.* And if such charges are made, the general application of the statute to areas unrelated to expression will provide the courts with a yardstick with which to measure the licensor's occasional speech-related decision.

486 U.S. 760-61 (emphasis added); *cf. FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225 (1990) (reviewing facial validity of zoning and permit scheme only after determining that it was "more onerous with respect to sexually oriented businesses than with respect to the vast majority of other businesses.")

As the dissent in *Lakewood* pointed out, "the doctrine that governs facial challenges to local laws in the First Amendment area" is both "extraordinary" and "peculiar." 486 U.S. at 772-73 (White, J., dissenting, joined by Stevens and O'Connor, JJ.); *see Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 616-17 (1937) and cases cited by the *Lakewood* dissent, 486 U.S. at 775-776, n.3. This Court has permitted facial challenges only in "exceptional cases" involving "law[s] that require[] a license to engage in activity protected by the First Amendment." *Lakewood*, 486 U.S. at 776. As the *Lakewood* dissent stated, there is no First Amendment right to set up a newsrack on a city sidewalk:

> There is a First Amendment right to sell books, but we would not accept an argument that a city must allow a book seller to construct a book shop – even a small one – on a city sidewalk. The right to leaflet does not create a right to build a booth on city streets from which leafletting can be conducted.

Id. at 780.

The *Lakewood* majority held that regulating the sale of newspapers posed "unique risks" because it involved "conduct commonly associated with expression." *Id.* at 761. Indeed, the majority justified entertaining a facial challenge in *Lakewood* because the licensing scheme was

"directed narrowly and specifically" at newspapers, which "are in the business of expression." *Id.* There is no reason to extend such extraordinary protection to the sale of sweatshirts and stuffed animals.

In sum, the Ninth Circuit's decision finds support in neither the majority nor the dissenting opinions in *Lakewood*. The court incorrectly determined that section 660.2(j) was subject to a facial challenge and was invalid. This petition should be granted in order to clarify that *Lakewood's* exception to the facial challenge doctrine applies only to a permit scheme "directed narrowly and specifically at expression or conduct commonly associated with expression."

IV. THE NINTH CIRCUIT'S INJUNCTION IS AN IMPERMISSIBLE EXERCISE OF FEDERAL JUDICIAL POWER.

The Ninth Circuit not only erred by applying to sales of commercial merchandise and food the constitutional protections afforded charitable fundraising. The Ninth Circuit compounded this error by transforming the reasons for protecting fundraising – that such activity is "characteristically intertwined" with speech – into the operative terms of an injunction. In fashioning its order, the Ninth Circuit violated restraints on the exercise of equitable powers by federal courts.

Federal Rule of Civil Procedure 65(d) requires that injunctions be "specific in terms, [and] define in reasonable detail . . . the act or acts sought to be restrained." In *Schmidt v. Lessard*, 414 U.S. 473 (1974), this Court explained:

> [T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.

Id. at 476. The Ninth Circuit itself has construed this rule to require that "the language of injunctions . . . be reasonably clear so that ordinary persons will know precisely what action is proscribed." *Portland Fem. Women's Ctr. v. Advocates for Life*, 859 F.2d 681, 685 (9th Cir. 1988).

Unfortunately, the Ninth Circuit failed to follow both this Court's and its own directions in crafting the injunction in this case. The Ninth Circuit enjoined the City from enforcing section 660.2(j)

> against plaintiffs or any other nonprofit organization or person acting for it, with respect to the sale of merchandise which is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message.

952 F.2d at 1066.

This injunction does not inform city officials what action is proscribed. Officers in the street are left to guess, under threat of contempt, what the words "inextricably intertwined" mean. Officers are left to determine whether the message must be physically imbedded in the design or simply connected in meaning to some purpose of the organization. Faced with the possibility of contempt,

officials may understandably take no action at all, even against the most flagrant violations.[12]

The Ninth Circuit's injunction essentially commands local officials not to enforce the ordinance if to do so would violate the First Amendment. A failure to divine the precise limitations of this protection is punishable by the strong medicine of contempt. Such an order violates restrictions on federal judicial power. If unreversed, the opinion will invite similar, open-ended injunctions. Accordingly, this petition should be granted.

CONCLUSION

The Ninth Circuit departed from fundamental First Amendment principles. The opinion below unjustifiably expands this Court's charitable fundraising cases to create a new category of protected speech: merchandising by nonprofit organizations. In addition, the Ninth Circuit's opinion misapplies the *O'Brien* test for regulations having an incidental impact on expressive activity, and broadens *Lakewood's* facial challenge doctrine to strike down the type of regulation this Court did not intend *Lakewood* to reach. Finally, the Ninth Circuit's injunction violates restraints on the exercise of federal courts' equitable power.

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[12] The photographs in the record of such merchandise illustrate the difficulty facing officers who seek to comply with the Ninth Circuit's standard. CR 87; see fn. 5, *supra*.

For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: March 25, 1992

APPENDIX A

GAUDIYA VAISHNAVA SOCIETY, a California religious non-profit corporation,
Plaintiff-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant-Appellant.
No. 88-1904,
United States Court of Appeals,
Ninth Circuit,
Argued and Submitted March 16, 1989.
Decided April 10, 1990.
As Amended on Denial of Rehearing and Rehearing En Banc Dec. 26, 1991.

Burk E. Delventhal, Deputy City Atty., San Francisco, Cal., for defendant-appellant.

Robert C. Moest, Barry A. Fisher, David Grosz, Fleishman, Fisher & Moest, Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California.

Before BRUNETTI and NOONAN, Circuit Judges, and HUPP,* District Judge.

ORDER AND AMENDED OPINION

BRUNETTI, Circuit Judge:

This action challenges the constitutionality of an ordinance which regulates the sale of merchandise on public sidewalks by nonprofit groups. The district court concluded that the ordinance violated the nonprofits'

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* Honorable Harry L. Hupp, United States District Judge for the Central District of California, sitting by designation.

First Amendment rights and enjoined its enforcement insofar as it prohibits the sale by nonprofit organizations of merchandise constituting or making a statement carrying a political, religious, philosophical or ideological message. We affirm.

BACKGROUND

The appellees are five nonprofit organizations engaged in a variety of charitable, religious and political activities in the San Francisco area. All five of the nonprofit groups have over the past several years sold various message-bearing ("expressive") merchandise such as T-shirts, books, buttons, stuffed animals, jewelry and bumper stickers. The district court in its findings described each organization: Gaudiya Vaishnava Society, a religious organization, performs sankirtan, a public ritual intended to disseminate the teachings of and win converts to Gaudiya Vaishnavism. In the course of sankirtan, members collect alms and offer clothing for sale, some of which bear messages related to the organization's religious beliefs. Greenpeace Pacific-Southwest, Inc., is a nonprofit political group which advocates numerous environmental causes. As part of its activities, Greenpeace sets up tables in the City of San Francisco to bring its message to the general public and solicit financial contributions and membership. At these tables Greenpeace sells a wide variety of merchandise, including message-bearing T-shirts. All of its merchandise is intended to transmit messages, verbally or symbolically, about the causes Greenpeace espouses. San Francisco Nuclear Weapons Freeze Campaign is an unincorporated political organization that advocates "freezing" and

reversing the production of nuclear arms. The organization is engaged in a campaign to inform the public about its beliefs. The group communicates its message and solicits money by setting up tables in San Francisco to distribute literature, solicit signatures on petitions, and sell buttons, postcards, bumper stickers and T-shirts. San Francisco CISPES is the San Francisco chapter of the Committee in Solidarity with the People of El Salvador. The Organization is opposed to the United States foreign policy regarding El Salvador and other Central American countries. To raise funds and disseminate its message, CISPES operates street corner tables, soliciting donations and offering for sale flyers, buttons, message-bearing T-shirts and literature. San Francisco Lesbian-Gay Freedom Day Parade and Celebration Committee, Inc. is a nonprofit educational organization which organizes civil rights events. The organization raises its operating budget by selling message-bearing buttons and T-shirts.

The nonprofits challenged San Francisco Police Code § 660.2(i) which prohibited nonprofit organizations from selling in the Fisherman's Wharf or Union Square areas of San Francisco without a commercial peddler's permit, any merchandise other than books, pamphlets, buttons, bumperstickers, posters, or items that have no intrinsic value other than to communicate a message.[1] As

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[1] Peddler permits under S.F.Cal.Police Code §§ 869-869.18 are granted, denied and revoked at the discretion of the police department. Permits are only issued to natural persons, not organizations and are nontransferable. Applicants are charged a $300 nonrefundable application fee and an annual permit tax. The district made findings that few if any of these permits were available.

originally enacted, the ordinance required nonprofits to register with the police department and make certain disclosures to the public regarding their purposes.

After the adoption of the ordinance, tourists, merchants and other citizens complained about the inadequate regulation of sales by charitable organizations.[2] The ordinance was amended to require all individuals, including those hired by charitable organizations, to obtain a peddling permit before selling merchandise on public streets. The penalty for violation of the ordinance is a fine of fifty to five hundred dollars or imprisonment for repeated violations. San Francisco Police Code, § 869.1.

On 22 July 1986, one of the nonprofits, appellee Gaudiya Vaishnava Society ("GVS") instituted an action for injunctive and declaratory relief, and applied for a temporary restraining order. The other four named plaintiffs joined suit on 4 August 1986 when GVS filed an amended complaint.

The district court awarded the plaintiffs a preliminary injunction on 15 August 1986. The court informed the parties that it intended to issue an order enjoining § 660.2(i) only as it applied to the sale of "merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization." The City objected as it

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[2] Because of overhead costs associated with maintaining a storefront, the local merchants complained that the nonprofits are able to discount the price of similar merchandise like T-shirts by as much as 33%.

did not want its police officers to have to determine which merchandise met this test. The court therefore enjoined the City from enforcing the entire ordinance.

Two months later, at the motion of the City, the Court modified the injunction to reflect the initial proposed order.[3]

Before the permanent injunction proceedings came before the district court, the City recodified § 660.2(i) as § 660.2(j) and amended it to its present form, excluding from the peddler permit requirement, the sale of merchandise which had no intrinsic purpose or value other

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[3] The October 10, 1986, district court order states that:

> 1. The sale by an organization, or its members or representatives, of books and pamphlets as well as articles of clothing and other merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization ('expressive item') is an activity protected by the First Amendment.
>
> * * *
>
> 4. The peddlers' permit provision, § 660.2(i), does not offer a constitutionally adequate alternative to plaintiffs because the Police Code makes the issuance of permits discretionary, subjects them to being revoked on discretionary grounds, denies them to plaintiffs as charitable organizations, imposes an excessive application fee and annual tax, and makes few, if any, permits presently available to anyone. Therefore, defendant, is enjoined from enforcing the prohibition against 'sales solicitations for charitable purposes,' [in Fisherman's Wharf area], against any charitable organization or person acting for it with respect to the sale or distribution of expressive items as defined in paragraph 1 of this order.

than to communicate a message.[4] The parties agreed that the original preliminary injunction would apply to § 660.2(j). This amendment narrowed the issue before the district court to whether the City could regulate the sale of merchandise, such as T-shirts, stuffed animals or jewelry, constituting or making a statement carrying a message expressing the beliefs of a nonprofit organization.

On 21 March 1988 the district court issued its Findings of Fact and Conclusions of Law and its judgment granting plaintiffs a permanent injunction. The district court found that the sale of expressive items was protected by the First Amendment, and held that the City's commercial peddler's permit system was unconstitutional as it made issuance and revocation of permits discretionary, denied permits to charitable organizations, imposed an excessive application fee and annual tax, and made few if any permits available to anyone. This appeal by the City followed.

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[4] Section 660.2(j) of the San Francisco Municipal Code (Police Code § 660 et seq.) currently provides:

> No person may engage in sales solicitations for charitable purposes by means of selling clothing, jewelry, or any other goods, products, services or merchandise in any area of the City and County of San Francisco unless that person obtains the appropriate peddling permit pursuant to Articles 13, 17.3 or 24 of the San Francisco Police Code. This Section shall not apply to the sale of books, pamphlets, buttons, bumperstickers, posters or any other type of item that has no intrinsic value or purpose other than to communicate a message. (Emphasis added.)

ANALYSIS

I

The district court's jurisdiction over the underlying litigation of this appeal is based on 28 U.S.C. §§ 1331 and 1343(a)(3). We have jurisdiction over an appeal from an order issuing a permanent injunction under 28 U.S.C. § 1291.

Our review of an order granting a motion for a permanent injunction is limited to determining whether the district court abused its discretion in issuing the order, based on erroneous legal standards, or clearly erroneous findings of fact. S.E.C. v. Goldfield Deep Mines Co. of Nevada, 758 F.2d 459, 465 (9th Cir. 1985). However, we also review the permanent injunction for constitutional infirmity. Because this involves the application of undisputed facts to constitutional law, this review is done de novo. Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681, 684 (9th Cir.1988), citing Jews for Jesus, Inc. v. Board of Airport Commissioners of City of Los Angeles, 785 F.2d 791, 792 (9th Cir.1986), aff'd by 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987). We conduct an independent review of the record to be sure that "the speech in question actually falls within the protected category", and to determine whether the constitutional factors have properly been applied. Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527 (9th Cir.1984), rev'd on other grounds, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

Because this case involves a licensing ordinance which allegedly vests unbridled discretion in a government official over whether to deny or permit expressive

activity, the nonprofits may challenge it facially without the necessity of first applying for, and being denied, a permit. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 108 S.Ct. 2138, 2143, 100 L.Ed.2d 771 (1988).

Under Lakewood, "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. . . . The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." 486 U.S. at 759, 108 S.Ct. at 2145.

Here, the unguided discretion provided by the peddling-permit scheme grants the police chief complete power to allow or prohibit charitable sales solicitation for any reason, including the message conveyed by the sales pitch or by the goods themselves. Since the solicitations at issue here are protected expression, see infra, the scheme grants power to the chief of police to discriminate based on the content of protected expression.

The regulation also has a close enough nexus to expression to pose a real threat of censorship. Section 660.2(j) regulates conduct which is itself protected speech – charitable sales solicitation. The chief of police can use discretion to shut off plaintiffs' speech. This situation is different from one in which a law with no close connection to expression provides an official with discretion that might be used to reward or punish speech. See Lakewood, 486 U.S. at 761, 108 S.Ct. at 2146.

II

First Amendment Protection

The first question we are called upon to answer is whether the sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message falls under the protection of the First Amendment. This question is one of first impression for the courts of appeals.

The City argues that the sale of merchandise is nothing more than a commercial transaction and therefore is afforded no constitutional protection. In order to reach its conclusion the City has adopted a test it calls the "purely communicative value test." Under this test the City reasons that an expressive item sold by a nonprofit organization is protected only when it has no intrinsic value other than its message. Because items such as T-shirts, jewelry, and stuffed animals have intrinsic value beyond the messages they convey, the City argues that the sale of such items constitutes a commercial transaction and is not constitutionally protected.

The City cites little support for its adoption of the "purely communicative value" test. Because no case law draws this intrinsic value distinction, the City cites cases which instead draw a distinction between the sale of merchandise bearing a group's message and the sale of merchandise bearing no message. For instance, the City cites Muhammad Temple of Islam-Shreveport v. City of Shreveport, La., 387 F.Supp. 1129 (W.D.La.1979), aff'd by 517 F.2d 922 (5th Cir.1975) (Muhammed-Temple), wherein the plaintiffs sold fish and religious newspapers on public streets. The court held that the City could regulate the

sale of fish as it was a "purely commercial activity." Muhammed-Temple, 387 F.Supp. at 1136. However, the court held that the City could not interfere with the plaintiffs' right to sell its religious newspaper which was designed "to spread the word of their religion." Id. The court drew no distinction between the intrinsic value of fish and newspapers but instead relied on the fact that the newspaper conveyed the group's message, while the fish did not.

The appellees do not argue this point, and the lower court judgment does not allow the nonprofits to sell merchandise bearing no message, such as fish. The nonprofits contend that because the T-shirts and other merchandise they sell convey core First Amendment messages (political, religious and philosophical), their activity should be afforded full protection under the First Amendment.

The Supreme Court has held that fund-raising for charitable organizations is fully protected speech. Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Additionally, it has held that an expressive item does not lose its constitutional protections because it is sold rather than given away. City of Lakewood, 108 S.Ct. at 2143 n. 5; Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298 (1981); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980).

The Supreme Court has recognized that drawing the line between "purely commercial ventures and protected

distribution of written materials [is] a difficult task." Schaumburg, 444 U.S. at 630, 100 S.Ct. at 832. In attempting to distinguish between commercial speech and fully protected speech, the Court in Schaumburg held that when a transaction "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it [is not treated as] a variety of purely commercial speech." 444 U.S. at 632, 100 S.Ct. at 834. Because charitable solicitation is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues" the Schaumburg court held it must be treated as a fully protected activity under the First Amendment. Id.

Likewise, in Riley, the Supreme Court held that "where . . . the component parts of a single speech are inextricably intertwined we cannot parcel out the speech, applying one test to one phrase and another test to another phrase," Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S.Ct. 2667, 2677, 101 L.Ed.2d 669 (1988). Riley involved a state-law requirement that in conducting fund-raising for charitable organizations the professional fund-raisers must insert in their presentations a statement setting forth the percentage of contributions that are actually turned over to the charitable organization. The court refused to separate the component parts of charitable solicitations from the fully protected whole and applied exacting First Amendment scrutiny. Id.

The Court in Fox reaffirmed its holding in Riley that the level of First Amendment scrutiny depends upon the

nature of the speech taken as a whole. 109 S.Ct. at 3031. The court reviewed whether a state law which prohibited AFS, Inc., a private commercial enterprise from demonstrating and selling its houseware at a party hosted in a student dormitory violated the First Amendment. Id. AFS, Inc. argued that its presentations touched on other subjects such as financial responsibility and how to run an efficient home and that pure speech and commercial speech are inextricably intertwined and therefore should be classified as fully protected speech. The Supreme Court noted that "there is nothing whatever inextricable about the noncommercial aspect of these presentations" and that

> these home ecomonic elements no more converted AFS's presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert than into religious or political speech. . . . [C]ommunications can constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . . [A]dvertising which 'links a product to a current debate' is not thereby entitled to the constitutional protection afforded noncommercial speech.

Fox, 109 S.Ct. at 3031-32 (citations omitted).

The street sale of merchandise such as a T-shirt and stuffed animals involves "commercial communication by the sales force." See Project 80's, Inc. v. City of Pocatello, 876 F.2d 711, 714 (9th Cir.1988) (youth organization's door to door candy sales activities is commercial speech). As the district court found, however, Gaudiya Vaishnava Society, Greenpeace, CISPES, and San Francisco Nuclear

Weapons Freeze Campaign sell their merchandise in conjunction with other activities in order to disseminate their organizations' message. The nonprofit groups inform individuals of their causes through distributing their literature, engaging in persuasive speech, and selling merchandise with messages affixed to the product. This "informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," is fully protected speech. Schaumburg, 444 U.S. at 633, 100 S.Ct. at 834. Where the pure speech and commercial speech by the nonprofits during these activities is inextricably intertwined, the entirety must be classified as noncommercial and we must apply the test for fully protected speech. Riley, 108 S.Ct. at 2677.[5] Accordingly, the district court correctly found that the San Francisco Ordinance impermissibly regulates protected speech in a public forum.

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[5] The City also contends that the only political, religious, philosophical or ideological message conveyed during the sales of merchandise by the nonprofits is a small, innocuous, camouflaged or removable message on the merchandise itself. We do not address the case of sales of merchandise not inextricably intertwined with first amendment speech. That situation, which was not presented by the facts in this case, would presumably fall under the rule of Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). If the speech element was purely commercial, a political or religious message not intertwined with that commercial message would be insufficient to transform the whole into protected speech. This facial, systemic challenge does not require us to determine at what point the commercial element of a sale of any type of merchandise would so overwhelm the noncommercial element with which it is intertwined.

The City has consistently argued that the ordinance is valid as a law of general application regulating conduct that may have an incidental effect on speech, citing United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

We note here for purposes of clarity only that the four-part balancing test first enunciated in O'Brien does not apply to this case. O'Brien held that the government's interest in prohibiting the act of draft card destruction could justify an "incidential limitation[ ] on First Amendment freedoms." Id. at 376, 88 S.Ct. at 1679.

We are not concerned here with expressive conduct regarding symbolic items, as was the Court in both O'Brien and, more recently, Texas v. Johnson, 491 U.S. 397, 402-06, 109 S.Ct. 2533, 2538-40, 105 L.Ed.2d 342 (1989). This case, rather, is one that requires us to examine whether the commercial and pure elements of speech are inextricably intertwined, as in Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S.Ct. 2687, 101 L.Ed.2d 669 (1988), and Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Therefore, we reject the City's contention that under O'Brien, the ordinance was valid.

Even if one did apply the four tests of O'Brien, the ordinance would not pass muster. The ordinance does pass three of the tests. It is within the constitutional power of the city. It protects important governmental interests in avoiding clutter and promoting the aesthetic appearance of the city. These interests are not related to

communication. But the fourth test means that "the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985); or, in other words, the regulation must not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989). In the present case rules that give guidance to the chief of police would be compatible with the city's interests. No need for unbridled discretion in the chief exists. The ordinance fails to meet the standards set by O'Brien.

III

The City's Permit System

The district court found that the city ordinance was unconstitutional on its face because it permitted the denial or revocation of a permit on the basis of discretionary judgment by the Chief of Police. We agree.

The Supreme Court has repeatedly recognized public streets "as the archetype of a traditional public forum." Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 2499, 101 L.Ed.2d 420 (1988). In these traditional public fora, the government's authority to restrict speech is at its minimum. Time, place and manner restrictions are valid only if they are content-neutral, narrowly tailored to serve a significant government interest, and retain ample alternative channels of communication. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct.

948, 954, 74 L.Ed.2d 794 (1983). As an application of the requirement that restrictions be narrowly tailored, a law cannot condition the free exercise of First Amendment rights on the "unbridled discretion" of government officials. City of Lakewood, 108 S.Ct. at 2143.

In this case, nonprofits wishing to sell merchandise that is inextricably intertwined with otherwise fully protected speech are required to obtain a peddler's permit pursuant to Articles 13, 17.3 or 24 of the San Francisco Police Code. Section 869.7 of Article 13 requires that an application for a peddler's permit be submitted to the Chief of Police. Under Section 869.2 "[t]he Chief of Police may issue a permit. . . . " (Emphasis added). The ordinance provides no specific grounds for granting or denying permits: no explicit limits are placed on the Chief of Police's discretion. An almost identical permit system was struck down by the Supreme Court in City of Lakewood, 108 S.Ct. at 2152. The Court in City of Lakewood, held that it is unconstitutional to grant an official "unfettered discretion to deny a permit application." Id. "Such discretion grants officials the power to discriminate and raises the spectre of selective enforcement on the basis of the content of speech." N.A.A.C.P., Western Region v. City of Richmond, 743 F.2d 1346, 1357 (9th Cir.1984). Because the Chief of Police is granted complete discretion in denying or granting such permits, we hold that the City's ordinance is not saved from constitutional infirmity by its commercial peddler's permit system.

CONCLUSION

The district court permanently enjoined the City from enforcing section 660.2(j) of the San Francisco Police Code against plaintiffs or any nonprofit organization or person acting for it, with respect to the sale of merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization. We hold that when nonprofits engage in activities where pure speech and commercial speech are inextricably intertwined the entirety must be classified as fully protected noncommercial speech. Accordingly, we modify the permanent injunction to prohibit the city from enforcing Section 660.2(j) of the San Francisco Police code against plaintiffs or any other nonprofit organization or person acting for it, with respect to the sale of merchandise which is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message.

AFFIRMED AS MODIFIED.

APPENDIX B

GAUDIYA VAISHNAVA SOCIETY, a California religious non-profit corporation, Plaintiff-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO, Defendant-Appellant.

No. 88-1904.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 16, 1989.

Decided April 10, 1990.

Burk E. Delventhal, Deputy City Atty., San Francisco, Cal., for defendant-appellant.

Robert C. Moest, Barry A. Fisher, David Grosz, Fleishman, Fisher & Moest, Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California.

Before BRUNETTI and NOONAN, Circuit Judges, and HUPP,* District Judge.

BRUNETTI, Circuit Judge:

This action challenges the constitutionality of an ordinance which regulates the sale of merchandise on public sidewalks by nonprofit groups. The district court concluded that the ordinance violated the nonprofits'

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* Honorable Harry L. Hupp, United States District Judge for the Central District of California, sitting by designation.

First Amendment rights and enjoined its enforcement insofar as it prohibits the sale by nonprofit organizations of merchandise constituting or making a statement carrying a political, religious, philosophical or ideological message. We affirm.

BACKGROUND

The appellees are five nonprofit organizations engaged in a variety of charitable, religious and political activities in the San Francisco area. All five of the nonprofit groups have over the past several years sold various message-bearing ("expressive") merchandise such as T-shirts, books, buttons, stuffed animals, jewelry and bumper stickers. The district court in its findings described each organization: Gaudiya Vaishnava Society, a religious organization, performs sankirtan, a public ritual intended to disseminate the teachings of and win converts to Gaudiya Vaishnavism. In the course of sankirtan, members collect alms and offer clothing for sale, some of which bear messages related to the organization's religious beliefs. Greenpeace Pacific-Southwest, Inc., is a nonprofit political group which advocates numerous environmental causes. As part of its activities, Greenpeace sets up tables in the City of San Francisco to bring its message to the general public and solicit financial contributions and membership. At these tables Greenpeace sells a wide variety of merchandise, including message-bearing T-shirts. All of its merchandise is intended to transmit messages, verbally or symbolically, about the causes Greenpeace espouses. San Francisco Nuclear Weapons Freeze Campaign is an unincorporated political organization that advocates "freezing" and

reversing the production of nuclear arms. The organization is engaged in a campaign to inform the public about its beliefs. The group communicates its message and solicits money by setting up tables in San Francisco to distribute literature, solicit signatures on petitions, and sell buttons, postcards, bumper stickers and T-shirts. San Francisco CISPES is the San Francisco chapter of the Committee in Solidarity with the People of El Salvador. The Organization is opposed to the United States foreign policy regarding El Salvador and other Central America countries. To raise funds and disseminate its message, CISPES operates street corner tables, soliciting donations and offering for sale flyers, buttons, message-bearing T-shirts and literature. San Francisco Lesbian-Gay Freedom Day Parade and Celebration Committee, Inc. is a nonprofit educational organization which organizes civil rights events. The organization raises its operating budget by selling message-bearing buttons and T-shirts.

The nonprofits challenged San Francisco Police Code § 660.2(i) which prohibited nonprofit organizations from selling in the Fisherman's Wharf or Union Square areas of San Francisco without a commercial peddler's permit, any merchandise other than books, pamphlets, buttons, bumper stickers, posters, or items that have no intrinsic value other than to communicate a message.[1] As originally

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[1] Peddler permits under S.F.Cal. Police Code §§ 869-869.18 are granted, denied and revoked at the discretion of the police department. Permits are only issued to natural persons, not organizations and are nontransferable. Applicants are charged a $300 nonrefundable application fee and an annual permit tax. The district made findings that few if any of these permits were available.

enacted, the ordinance required nonprofits to register with the police department and make certain disclosures to the public regarding their purposes.

After the adoption of the ordinance, tourists, merchants and other citizens complained about the inadequate regulation of sales by charitable organizations.[2] The ordinance was amended to require all individuals, including those hired by charitable organizations, to obtain a peddling permit before selling merchandise on public streets. The penalty for violation of the ordinance is a fine of fifty to five hundred dollars or imprisonment for repeated violations. San Francisco Police Code, § 869.1.

On 22 July 1986, one of the nonprofits, appellee Gaudiya Vaishnava Society ("GVS") instituted an action for injunctive and declaratory relief, and applied for a temporary restraining order. The other four named plaintiffs joined suit on 4 August 1986 when GVS filed an amended complaint.

The district court awarded the plaintiffs a preliminary injunction on 15 August 1986. The court informed the parties that it intended to issue an order enjoining § 660.2(i) only as it applied to the sale of "merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization." The City objected as it

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[2] Because of overhead costs associated with maintaining a storefront, the local merchants complained that the nonprofits are able to discount the price of similar merchandise like T-shirts by as much as 33%.

did not want its police officers to have to determine which merchandise met this test. The court therefore enjoined the City from enforcing the entire ordinance.

Two months later, at the motion of the City, the court modified the injunction to reflect the initial proposed order.[3]

Before the permanent injunction proceedings came before the district court, the City recodified § 660.2(i) as § 660.2(j) and amended it to its present form, excluding

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[3] The October 10, 1986, district court order states that:

> 1. The sale by an organization, or its members or representatives, of books and pamphlets as well as articles of clothing and other merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization ('expressive item') is an activity protected by the First Amendment.
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> * * *
>
> 4. The peddlers' permit provision, § 660.2(i), does not offer a constitutionally adequate alternative to plaintiffs because the Police Code makes the issuance of permits discretionary, subjects them to being revoked on discretionary grounds, denies them to plaintiffs as charitable organizations, imposes an excessive application fee and annual tax, and makes few, if any, permits presently available to anyone. Therefore, defendant, is enjoined from enforcing the prohibition against 'sales solicitations for charitable purposes,' [in Fisherman's Wharf area], against any charitable organization or person acting for it with respect to the sale or distribution of expressive items as defined in paragraph 1 of this order.

from the peddler permit requirement, the sale of merchandise which had no intrinsic purpose or value other than to communicate a message.[4] The parties agreed that the original preliminary injunction would apply to § 660.2(j). This amendment narrowed the issue before the district court to whether the City could regulate the sale of merchandise, such as T-shirts, stuffed animals or jewelry, constituting or making a statement carrying a message expressing the beliefs of a nonprofit organization.

On 21 March 1988 the district court issued its Findings of Fact and Conclusions of Law and its judgment granting plaintiffs a permanent injunction. The district court found that the sale of expressive items was protected by the First Amendment, and held that the City's commercial peddler's permit system was unconstitutional as it made issuance and revocation of permits discretionary, denied permits to charitable organizations, imposed an excessive application fee and annual tax, and

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[4] Section 660.2(j) of the San Francisco Municipal Code (Police Code § 660 et. seq.) currently provides:

> No person may engage in sales solicitations for charitable purposes by means of selling clothing, jewelry, or any other goods, products, services or merchandise in any area of the City and County of San Francisco unless that person obtains the appropriate peddling permit pursuant to Articles 13, 17.3 or 24 of the San Francisco Police Code. *This Section shall not apply to the sale of books, pamphlets, buttons, bumperstickers, posters or any other type of item that has no intrinsic value or purpose other than to communicate a message.* (Emphasis added.)

made few if any permits available to anyone. This appeal by the City followed.

ANALYSIS

I

The district court's jurisdiction over the underlying litigation of this appeal is based on 28 U.S.C. §§ 1331 and 1343(a)(3). We have jurisdiction over an appeal from an order issuing a permanent injunction under 28 U.S.C. § 1291.

Our review of an order granting a motion for a permanent injunction is limited to determining whether the district court abused its discretion in issuing the order, based on erroneous legal standards, or clearly erroneous findings of fact. *S.E.C. v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 465 (9th Cir.1985). However, we also review the permanent injunction for constitutional infirmity. Because this involves the application of undisputed facts to constitutional law, this review is done de novo. *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 684 (9th Cir.1988), citing *Jews for Jesus, Inc. v. Board of Airport Commissioners of City of Los Angeles*, 785 F.2d 791, 792 (9th Cir.1986), *aff'd by* 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987). We conduct an independent review of the record to be sure that "the speech in question actually falls within the protected category", and to determine whether the constitutional factors have properly been applied. *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984), *rev'd on other grounds*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

Because this case involves a licensing ordinance which allegedly vests unbridled discretion in a government official over whether to deny or permit expressive activity, the nonprofits may challenge it facially without the necessity of first applying for, and being denied, a permit. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S.Ct. 2138, 2143, 100 L.Ed.2d 771 (1988).

II

First Amendment Protection

The first question we are called upon to answer is whether the sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message falls under the protection of the First Amendment. This question is one of first impression for the courts of appeals.

The City argues that the sale of merchandise is nothing more than a commercial transaction and therefore is afforded no constitutional protection. In order to reach its conclusion the City has adopted a test it calls the "purely communicative value test." Under this test the City reasons that an expressive item sold by a nonprofit organization is protected only when it has *no intrinsic value* other than its message. Because items such as T-shirts, jewelry, and stuffed animals have intrinsic value beyond the messages they convey, the City argues that the sale of such items constitutes a commercial transaction and is not constitutionally protected.

The City cites little support for its adoption of the "purely communicative value" test. Because no case law

draws this intrinsic value distinction, the City cites cases which instead draw a distinction between the sale of merchandise bearing a group's message and the sale of merchandise bearing no message. For instance, the City cites *Muhammad Temple of Islam-Shreveport v. City of Shreveport, La.*, 387 F.Supp. 1129 (W.D.La. 1974), *aff'd by* 517 F.2d 922 (5th Cir.1975) (*Muhammad-Temple*), wherein the plaintiffs sold fish and religious newspapers on public streets. The court held that the City could regulate the sale of fish as it was a "purely commercial activity." *Muhammad-Temple*, 387 F.Supp. at 1136. However, the court held that the City could not interfere with the plaintiffs' right to sell its religious newspaper which was designed "to spread the word of their religion." *Id.* The court drew no distinction between the intrinsic value of fish and newspapers but instead relied on the fact that the newspaper conveyed the group's message, while the fish did not.

The appellees do not argue this point, and the lower court judgment does not allow the nonprofits to sell merchandise bearing no message, such as fish. The nonprofits contend that because the T-shirts and other merchandise they sell convey core First Amendment messages (political, religious and philosophical), their activity should be afforded full protection under the First Amendment.

The Supreme Court has held that fundraising for charitable organizations is fully protected speech. *Board of Trustees of the State University of New York v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Additionally, it has held that an expressive item does not lose its constitutional protections because it is sold rather than given

away. *City of Lakewood*, 108 S.Ct. at 2143 n. 5; *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298 (1981); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980).

The Supreme Court has recognized that drawing the line between "purely commercial ventures and protected distribution of written materials [is] a difficult task." *Schaumburg*, 444 U.S. at 630, 100 S.Ct. at 832. In attempting to distinguish between commercial speech and fully protected speech, the Court in *Schaumburg* held that when a transaction "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it [is not treated as] a variety of purely commercial speech." 444 U.S. at 632, 100 S.Ct. at 833. Because charitable solicitation is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues" the *Schaumburg* court held it must be treated as a fully protected activity under the First Amendment. *Id.*

Likewise, in *Riley*, the Supreme Court held that "where . . . the component parts of a single speech are inextricably intertwined we cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 2677, 101 L.Ed.2d 669 (1988). *Riley* involved a state-law requirement that in conducting fund-raising for charitable organizations the professional fund-raisers must insert in their presentations a statement setting forth the percentage of

contributions that are actually turned over to the charitable organization. The court refused to separate the component parts of charitable solicitations from the fully protected whole and applied exacting First Amendment scrutiny. *Id.*

The Court in *Fox* reaffirmed its holding in *Riley* that the level of First Amendment scrutiny depends upon the nature of the speech taken as a whole. 109 S.Ct. at 3031. The court reviewed whether a state law which prohibited AFS, Inc., a private commercial enterprise from demonstrating and selling its houseware at a party hosted in a student dormitory violated the First Amendment. *Id.* AFS, Inc. argued that its presentations touched on other subjects such as financial responsibility and how to run an efficient home and that pure speech and commercial speech are inextricably intertwined and therefore should be classified as fully protected speech. The Supreme Court noted that "there is nothing whatever inextricable about the noncommercial aspect of these presentations" and that

> these home economic elements no more converted AFS's presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. . . . [C]ommunications can constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . . [A]dvertising which 'links a product to a current debate' is not thereby entitled to the constitutional protection afforded noncommercial speech.

Fox, 109 S.Ct. at 3031-32 (citations omitted).

The street sale of merchandise such as a T-shirt and stuffed animals involves "commercial communication by the sales force." *See Project 80's, Inc. v. City of Pocatello*, 876 F.2d 711, 714 (9th Cir.1988) (youth organization's door to door candy sales activities is commercial speech). As the district court found, however, Gaudiya Vaishnava Society, Greenpeace, CISPES, and San Francisco Nuclear Weapons Freeze Campaign sell their merchandise in conjunction with other activities in order to disseminate their organizations' message. The nonprofit groups inform individuals of their causes through distributing their literature, engaging in persuasive speech, and selling merchandise with messages affixed to the product. This "informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," is fully protected speech. *Schaumburg*, 444 U.S. at 633, 100 S.Ct. at 834. Where the pure speech and commercial speech by the nonprofits during these activities is inextricably intertwined, the entirety must be classified as noncommercial and we must apply the test for fully protected speech. *Riley*, 108 S.Ct. at 2677.[5] Accordingly, the district court correctly found that the San Francisco Ordinance impermissibly regulates protected speech in a public forum.

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[5] The City also contends that the only political, religious, philosophical or ideological message conveyed during the sales of merchandise by the nonprofits is a small, innocuous, camouflaged or removable message on the merchandise itself. We do not address these situations as we are not reviewing a particular application of the ordinance but a systemic challenge.

III

The City's Permit System

The district court found that the city ordinance was unconstitutional on its face because it permitted the denial or revocation of a permit on the basis of discretionary judgment by the Chief of Police. We agree.

The Supreme Court has repeatedly recognized public streets "as the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 2499, 101 L.Ed.2d 420 (1988). In these traditional public fora, the government's authority to restrict speech is at its minimum. Time, place and manner restrictions are valid only if they are content-neutral, narrowly tailored to serve a significant government interest, and retain ample alternative channels of communication. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 108 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). As an application of the requirement that restrictions be narrowly tailored, a law cannot condition the free exercise of First Amendment rights on the "unbridled discretion" of government officials. *City of Lakewood*, 108 S.Ct. at 2143.

In this case, nonprofits wishing to sell merchandise that is inextricably intertwined with otherwise fully protected speech are required to obtain a peddler's permit pursuant to Articles 13, 17.3 or 24 of the San Francisco Police Code. Section 869.7 of Article 13 requires that an application for a peddler's permit be submitted to the Chief of Police. Under Section 869.2 "[t]he Chief of Police *may* issue a permit. . . . " (Emphasis added). The ordinance provides no specific grounds for granting or denying permits; no explicit limits are placed on the Chief of

Police's discretion. An almost identical permit system was struck down by the Supreme Court in *City of Lakewood*, 108 S.Ct. at 2152. The Court in *City of Lakewood*, held that it is unconstitutional to grant an official "unfettered discretion to deny a permit application." *Id.* "Such discretion grants officials the power to discriminate and raises the spectre of selective enforcement on the basis of the content of speech." *N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir.1984). Because the Chief of Police is granted complete discretion in denying or granting such permits, we hold that the City's ordinance is not saved from constitutional infirmity by its commercial peddler's permit system.

CONCLUSION

The district court permanently enjoined the City from enforcing section 660.2(j) of the San Francisco Police Code against plaintiffs or any nonprofit organization or person acting for it, with respect to the sale of merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization. We hold that when nonprofits engage in activities where pure speech and commercial speech are inextricably intertwined the entirety must be classified as fully protected noncommercial speech. Accordingly, we modify the permanent injunction to prohibit the City from enforcing Section 660.2(j) of the San Francisco Police code against plaintiffs or any other nonprofit organization or person acting for it, with respect to the sale of merchandise which is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message.

AFFIRMED AS MODIFIED.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GAUDIYA VAISHNAVA SOCIETY, etc., et al., Plaintiffs, vs. CITY AND COUNTY OF SAN FRANCISCO, etc. Defendant.	Civ. No. 86-4227 WWS FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties have agreed that the trial may be held on the declarations filed in connection with plaintiffs' first motion for preliminary injunction, including the proceedings to modify that injunction, the memoranda submitted on the motion, the arguments of counsel on the preliminary injunction, additional declarations and exhibits offered by the defendant, and the court's file in the matter. All declarations and exhibits on file are admitted into evidence. The court finds as follows:

FINDINGS OF FACT

1. This suit for injunctive and declaratory relief, filed on July 22, 1986, challenged San Francisco Police Code sections 660 et seq., which regulate solicitations on behalf of charitable and religious organizations. On August 15, 1986, the court issued its preliminary injunction against the enforcement of section 660.2(i), and, on October 10, 1986, modified that injunction upon motion

of the defendant, the City and County of San Francisco. Section 660.2(i) prohibited solicitation of funds for charitable purposes through sales of certain tangible items in the area surrounding Fishermen's Wharf. In December, 1986, plaintiffs filed a second motion for preliminary injunction against the enforcement of a number of other provisions of the ordinance. As a result of the plaintiffs' pending suit and plaintiffs' second motion for preliminary injunction, article 9.6 of the San Francisco municipal code was amended effective April 3, 1987. The prohibition against sales of certain kinds of merchandise was reenacted as section 660.2(j), and it was agreed that the preliminary injunction already issued would apply to section 660.2(j).

2. The only issue remaining for trial is the validity of section 660.2(j), against the enforcement of which plaintiffs seek a permanent injunction.

3. Plaintiff Gaudiya Vaishnava Society is a religious organization whose members believe in Gaudiya Vaishnavism or Caitanyite Vaishnavism, a religion which originated in India, and adheres to the teachings of Sri Krishna Caitanya Mahaprabhu (Lord Caitanya) and his principal follower, Srila Rupa Goswami Prabhupada. The California temple of the Guadiya Vaishnava Society is located in San Francisco, and is incorporated as a California non-profit religious corporation. The members of the Gaudiya Vaishnava Society are required by their religious beliefs to engage in the practice of Sankirtan, a public ritual intended to disseminate the teachings of and win converts to Gaudiya Vaishnavism. In the courses of Sankirtan, Society members collect alms and offer for sale clothing and other items, some of which bear messages

related to the religious beliefs of the Gaudiya Vaishnava Society, as well as Vaishnavic literature, to the public.

4. Plaintiff Greenpeace Pacific-Southwest, Inc. (Greenpeace), is a California non-profit corporation that is affiliated with an international, non-profit organization that engages in what it characterizes as "the movement to protect our fragile globe's environment." Among its other positions, Greenpeace advocates international environmental agreements, prohibitions against commercial whaling and hunting of other marine mammals, and the reduction in the number of nuclear weapons. Greenpeace Pacific-Southwest, Inc., is one of six regional Greenpeace affiliates in the United States. As part of its activities, Greenpeace sets up tables in the city of San Francisco to bring Greenpeace's message to the general public and to solicit financial contributions and membership. At these tables, Greenpeace offers for sale to the public a wide variety of merchandise, including cassettes and records, books and pamphlets, buttons, posters, bumper stickers, message-bearing T-shirts and sweat shirts, jewelry, ornaments and stuffed animals. All the items carry identification of the organization, and all are intended to transmit messages, verbally or symbolically, about the causes Greenpeace espouses.

5. Plaintiff San Francisco Nuclear Weapons Freeze Campaign is the San Francisco chapter of the Northern California Bilateral Nuclear Freeze, an unincorporated political organization formed in 1981, that advocates "freezing" and reversing the production of nuclear arms. The organization is engaged in a campaign to inform the public about its beliefs and to organize interested citizens to urge the government to negotiate a comprehensive test

ban treaty and to stop research and development on the Strategic Defense Initiative. The San Francisco Freeze Campaign communicates its message and raises money at tables in various parts of the city, staffed by volunteers who distribute literature, solicit signatures on petitions, and sell buttons, postcards, bumper stickers and T-shirts. The funds raised by the sales support Freeze Campaign activities.

6. Plaintiff San Francisco CISPES, the San Francisco chapter of the Committee in Solidarity with the People of El Salvador, is an unincorporated association. Its members oppose United States foreign policy regarding El Salvador in particular and Central America in general. CISPES also provides humanitarian aid to the people of El Salvador. Its views are expressed at public demonstrations, fundraising events, and house-meetings. Both to raise funds and to disseminate its message, CISPES operates streetcorner tables, soliciting donations and offering for sale flyers, buttons, message-bearing T-shirts and literature.

7. Plaintiff San Francisco Lesbian-Gay Freedom Day Parade and Celebration Committee, Inc., is a California non-profit educational organization incorporated in 1971. Its original purpose, which remains a primary purpose of the organization, is to organize events to commemorate the "Stonewall Rebellion" of June, 1969, an event viewed by the organization as a watershed in the homosexual civil rights movement. The San Francisco parade committee raises approximately sixty percent of its operating budget through the sale by volunteers of message-bearing buttons and T-shirts.

8. Defendant City and County of San Francisco is a city and county organized pursuant to the laws of the State of California.

9. Article 9.6 of the San Francisco Police Code, sections 660-660.17, is a comprehensive regulation of public charitable solicitations in San Francisco. Organizations registered under the ordinance may, from tables located in compliance with the ordinance, engage in what the ordinance describes as "sales solicitations for a charitable purpose." § 660.1(i).

10. San Francisco Police Code § 660.2(j) permits sales solicitations for a charitable purpose of "books, pamphlets, buttons, bumperstickers, posters, or any other type of item that has no intrinsic value or purpose other than to communicate a message," but prohibits charitable sales solicitations for a charitable purpose of "clothing, jewelry, or any other goods, products, services or merchandise" unless the charitable organization has obtained a peddler's permit pursuant to articles 13, 17.3 or 24 of the San Francisco Police Code.

11. Should plaintiffs and their members engage in sales solicitations for a charitable purpose by selling on the streets, sidewalks, parks or other property under the control of the City and County of San Francisco articles of clothing and other merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization, they face criminal prosecution pursuant to Police Code section 660.14(a) and civil penalties of as much as $2,500, pursuant to section 660.14(e) for any violation.

12. Defendant contends that the sale of items which have any intrinsic value or purpose other than to communicate a message is a commercial transaction outside the scope and protection of the First Amendment. Defendant does not in this action attempt to justify section 660.2(j) as a reasonable regulation of speech protected by the First Amendment.

13. If any of the following conclusions of law should have been designated a finding of fact, it is incorporated herein by reference.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343(3).

2. The sale by an organization, or its members or representatives, of articles of clothing and other merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization is an activity protected by the First Amendment.

3. The provisions of San Francisco Police Code section 660.2(j) permitting plaintiffs to engage in sales solicitations for a charitable purpose, but only if they obtain a peddler's permit pursuant to articles 13, 17.3 or 24 of the San Francisco Police Code, do not offer a constitutionally adequate alternative to plaintiffs because those sections make the issuance of permits discretionary, subject them to being revoked on discretionary grounds, deny them to plaintiffs as charitable organizations, impose an excessive

application fee and annual tax, and make few, if any, permits available to anyone.

4. Section 660.2(j) violates the First Amendment insofar as it is applied to prohibit the sale on the streets, sidewalks, parks or other property under the control of the City and County of San Francisco by an organization, or its members or representatives, of articles of clothing and other merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization.

5. There is between the parties an actual controversy in that plaintiffs contend, but the City and County of San Francisco denies, that section 660.2(j) of the San Francisco Police Code is unconstitutional. The plaintiffs will suffer irreparable injury unless the enforcement of section 660.2(j) is enjoined insofar as it prohibits the sale by an organization, or its members or representatives, of articles of clothing and other merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization.

6. Plaintiffs have no plain, adequate, or complete remedy at law speedily to redress the wrongs herein complained of other than this action. Any other remedy to which plaintiffs could be remitted would be attended by such uncertainties and delays as would cause further injury. Damages are not adequate to protect plaintiffs from the continuing effects the abridgment of the exercise of their rights and those of their members under the first amendment.

7. Plaintiffs are the prevailing parties in this action, and are entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988. The court will retain jurisdiction to decide the amount of fees to be awarded in the event the defendant and plaintiffs do not settle the issue among themselves. The time limit for filing the motion for fees set forth in N.D. Cal. R. 270(1) is waived.

8. If any of the findings of fact should have been designated a conclusion of law, it is incorporated herein by reference.

Dated: 3/21/88

/s/ _____
Judge, United States
District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GAUDIYA VAISHNAVA SOCIETY, etc., et al.,	)	Civ. No. 86-4227 WWS
Plaintiffs,	)	JUDGMENT
vs.	)	
CITY AND COUNTY OF SAN FRANCISCO, etc.	)	
Defendant.	)	

This action came on for trial before the United States District Court for the Northern District of California, Hon. William W Schwarzer, Judge, and the matter has been duly tried.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that section 660.2(j) of the San Francisco Police Code, insofar as it prohibits the sale or distribution of articles of clothing and other merchandise constituting or making a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the plaintiffs' organizations, violates the First Amendment as incorporated by the Fourteenth Amendment; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant is permanently enjoined from enforcing section 660.2(j) of the San Francisco Police Code against plaintiffs or any other charitable organization or person acting for it with respect to the sale or distribution of articles of clothing or other merchandise constituting or making a statement carrying a religious, political,

philosophical or ideological message relevant to the purpose of the organization. The defendant is directed to distribute with any copy of the ordinance henceforth distributed a copy of this injunction.

Plaintiffs shall recover their attorney's fees, costs and expenses pursuant to 42 U.S.C. § 1988. The court will retain jurisdiction to decide the amount of fees to be awarded in the event the defendant and plaintiffs do not settle the issue among themselves. The time limit for filing the motion for fees sets forth in N.D. Cal. R. 270(1) is waived.

Dated: 3/21/88

/s/ _____
Judge, United States District Court

APPENDIX D

SAN FRANCISCO POLICE CODE
ARTICLE 9.6

SEC. 660.2. UNLAWFUL SOLICITATION. (a) No charitable organization may solicit, directly or through an agent or employee, any contribution for any charitable purpose or conduct any sales solicitation for charitable purposes activity on the streets, sidewalks, parks or other property under the control of the City and County of San Francisco unless such charitable organization shall have first obtained a Certificate of Registration from the Chief of Police or his or her designate, as hereinafter provided or has received a receipt from the Department indicating that the organization has filed a Statement of Registration and is authorized to solicit pending issuance by the Department of a Certificate of Registration.

(b) No individual, as agent or employee of another, shall solicit contributions for a charitable purpose on the streets, sidewalks, parks or other property under the control of the City and County of San Francisco unless the charitable organization on whose behalf the individual is soliciting has received a Certificate of Registration or has received a receipt from the Department indicating that the organization has filed a Statement of Registration and is authorized to solicit pending issuance by the Department of a Certificate of Registration.

(c) No individual shall engage in sales solicitations for a charitable purpose on the streets, sidewalks or other property under the control of the City and County of San Francisco without visibly displaying an identification card issued to that individual by the Chief of Police or his

or her designate as hereinafter provided. This provision shall not be enforced with respect to a charitable organization during the period after the organization has obtained a receipt indicating that the organization has filed a Statement of Registration and before the issuance to the organization of a Certificate of Registration.

(d)(1) No individual shall solicit for a charitable purpose or engage in sales solicitation for a charitable purpose on the streets, sidewalks or other property under the control of the City and County of San Francisco, unless, upon request from the person solicited for information about the organization, the solicitor shall provide to the person a card entitled "Solicitation for Charitable Purposes Card." The card shall be of a size to be prescribed by the Chief of Police or his or her designate, signed and dated under penalty of perjury by an individual who is a principal or officer of the charitable organization on whose behalf the solicitation is made.

The information on the card shall be printed in at least 10-point type and shall include the following:

(A) The name and address of the charitable organization on whose behalf the money will be collected.

(B) The name of the individual soliciting on behalf of the charitable organization.

(C) The number of the Certificate of Registration issued to the organization by the Chief of Police.

(D) If there is no charitable organization, the manner in which the money collected will be utilized for charitable purposes.

(E) The percentage of the purchase price that will be used for charitable purposes.

(F) If the solicitation is not a sales solicitation, the card may state, in place of the amount of fund raising expenses, that an audited financial statement of such expenses may be obtained by contacting the organization at the address disclosed.

(G) Whether the charitable organization on whose behalf the solicitation is made is tax exempt under state and federal law.

(H) The percentage of the total gift or purchase price which may be deducted as a charitable contribution under both federal and state law. If no portion is so deductible the card shall state that "This contribution is not tax deductible."

(I) If the charitable organization making the solicitation represents any non-governmental organization by any name which includes, but is not limited to, the term, "officer," "peace officer," "police," "law enforcement," "reserve officer," "deputy," or "deputy sheriff," which would reasonably be understood to imply that the organization is composed of law enforcement personnel, the solicitor shall give the total number of members in the organization and the number of members working or living within the county where the solicitation is being made, and if the solicitation is for advertising, the statewide circulation of the publication in which the solicited ad will appear.

(d)(2) No individual shall engage in sales solicitation for a charitable purpose by means of selling goods,

products or services from a stationary display on the streets or sidewalks or other places held open to the public unless, in addition to the requirements of Subsection (d)(1), the individual displays a sign which shall contain the name and address of the person on whose behalf the charitable solicitation is being made, and the fact that more information about the charitable organization is available upon request. This sign also shall state that a receipt must be provided to the person solicited for any sales transaction of $5 or more and that for sales transactions of less than $5, a receipt will be provided upon request. The sign shall be two feet by two feet square and shall be printed in black 36 point bold face print on a white background.

(d)(3) A volunteer who receives no compensation of any type from, or in connection with, a solicitation for a charitable organization which has qualified for a tax exemption under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended, and who is 15 years of age or younger, is not required to make any disclosures pursuant to this Section.

(d)(4) When the solicitation is not a sales solicitation, any individual may comply with the disclosure provisions of Section 660.2(d)(1) by providing in writing the name and address of the charitable organization on behalf of which all or any part of the money collected will be utilized for charitable purposes, the charitable purposes for which the solicitation is made and that the information about revenues and expenses of such organization, including its administration and fundraising costs, may be obtained by contacting the organization's office at the address disclosed. Such organization shall

provide such information to the person solicited immediately upon receipt of the request.

(e) No person, other than the Chief of Police or his or her designate, may alter an identification card or certificate of registration.

(f) No individual shall engage in a sales solicitation for charitable purposes while displaying an identification card issued by the Chief of Police or his or her designate in the name of another individual.

(g) No individual shall solicit for charitable purposes or engage in sales solicitations for charitable purposes from any vehicle.

(h) No individual shall engage in sales solicitations for charitable purposes by means of selling goods, products, services or merchandise on the public sidewalks:

(1) Within five feet of any of the following:

(a) A space designated by the Public Works Department of the City and County of San Francisco as a street artist space pursuant to Article 24 of the San Francisco Police Code. For the purposes of this Subsection, the five feet shall be measured from the outer edges of the street artist space in each direction parallel to the building side of the space and thence at a 90-degree angle to the curbside and building side of the sidewalk.

(b) A person peddling goods, products or services pursuant to a permit issued under Article 17.3 or Article 13 of the San Francisco Police Code, Article 5 of the San Francisco Public Works Code, or any other provision of the San Francisco Charter or San Francisco Municipal Code.

(c) A crosswalk.

(d) A fire hydrant.

(e) The end of the fire escape.

(2) Within eight feet of a person already engaged in sales solicitations pursuant to a Certificate of Registration issued under this article.

(3) Within 10 feet from the outer edge of any entrance to any building, including, but not limited to, doors, driveways, emergency exits measured in each direction parallel to the building line and thence at a 90-degree angle to the curb.

(4) Within 18 inches of the curb line of a sidewalk or more than 4-½ feet from the curb line of a sidewalk.

(5) In a space more than four feet long or five feet high. The height of the person or persons conducting the sales solicitation shall not be considered in determining compliance with this subsection.

(6) On any sidewalk adjacent to a curb that has been designated pursuant to ordinance or regulation as a bus zone or a white, blue, green, or yellow zone.

(7) If, due to such solicitation for sales on a public sidewalk, there remains open for the passage of pedestrians a space of less than eight feet in width, as measured on a line perpendicular to the curb line, from the edge of the solicitor's activities to the edge of the sidewalk or the edge of the building farthest from the edge of those activities. No portion of the area occupied by the solicitor for its activities shall be included in measuring the eight foot space. If there are located on a particular

side of a block two or more spaces that meet all other time, place and manner restrictions set out in this Section and leave available for pedestrian passage a space more than eight feet in width, the solicitor shall conduct his or her sales solicitation in that space that leaves available for pedestrian travel the maximum amount of sidewalk width.

(8) In any of the following areas:

(a) In any "P" district, as defined in Section 234 of the City Planning Code (Part II, Chapter II, San Francisco Municipal Code), located on Twin Peaks.

(b) On the sidewalk on the north side of Jefferson Street between Jones and Taylor.

(i) No individual shall directly or indirectly solicit contributions for any purpose by misrepresentation of his or her name, occupation, financial condition, exemption status, or residence, and no person shall make or perpetrate any other misstatement deception, or fraud in connection with any solicitation of any contribution for any purpose in the City and County of San Francisco or in any Statement of Registration or report filed under this Article.

(j) No individual shall engage in sales solicitations for charitable purposes by means of selling clothing, jewelry, or any other goods, products, services or merchandise in any area of the City and County of San Francisco unless that person obtains the appropriate peddling permit pursuant to Articles 13, 17.3 or 24 of the San Francisco Police Code. This Section shall not apply to the sale of books, pamphlets, buttons, bumperstickers, posters or

any other type of item that has no intrinsic value or purpose other than to communicate a message.

(k) Every charitable organization whose employee or agent violates any provision of this Article also shall be deemed to have violated such provision.

(l) Every commercial fundraiser whose employee or agent violates any provision of this Article also shall be deemed to have violated such provision.

(m) Sales solicitations for charitable purposes occurring on property under the jurisdiction of the Recreation and Parks Department shall be regulated by the San Francisco Park Code and written rules and regulations promulgated by the San Francisco Recreation and Parks Commission. (Amended by Ord. 106-87, App. 4/3/87; Ord. 289-90, App. 8/1/90)

APPENDIX E

SAN FRANCISCO POLICE CODE

ARTICLE 13

MISCELLANEOUS REGULATIONS FOR PROFESSIONS AND TRADES

Sec. 869.	Permit Required.
Sec. 869.1.	Penalty.
Sec. 869.2.	Limitation on Issuance of Permits.
Sec. 869.3.	Location Restrictions.
Sec. 869.4.	Peddler Permit to Natural Person Only.
Sec. 869.5.	Peddler to Personally Peddle.
Sec. 869.6.	Log to be Maintained.
Sec. 869.7.	Application for Peddler Permit.
Sec. 869.8.	Inspection by Health Department.
Sec. 869.9.	Peddler Employee.
Sec. 869.10.	Operation of Peddler Employee.
Sec. 869.11.	Fees – Peddler and Peddler Employee.
Sec. 869.12.	Peddler, Peddler Employees, License Fee.
Sec. 869.13.	License Fees – Proration Schedule – Date Payable.
Sec. 869.14.	Peddlers, Free.
Sec. 869.15.	Identification Card.
Sec. 869.16.	Rules and Regulations by Chief of Police or Director of Public Health.
Sec. 869.17.	Suspension and Revocation of Permit.
Sec. 869.18.	Severability.

SEC. 869. PERMIT REQUIRED. Except as provided in Articles 24, 24.1 and 24.2 of this Code, it shall be unlawful for any person to peddle goods, wares or merchandise, or any article, material or substance, of whatsoever kind, including persons selling fruits, vegetables, fish, fowl, nuts and eggs on the public streets or sidewalks of the City and County of San Francisco without first having obtained a permit from the Chief of Police

and having paid the fees and been granted a license as required by law.

Excluded from the provisions of this Section are property under the jurisdiction of the Recreation and Park Commission of the City and County of San Francisco, and the Board of Education of the City and County of San Francisco and areas designated by the Board of Supervisors as places where a street artist certified pursuant to initiative Ordinance 483-75, Proposition L on the November 4, 1975 ballot, may sell, offer for sale, expose for sale, or solicit offers to purchase any craft or work of his or her own creation.

Every person currently holding a peddler permit pursuant to Section 869 of this Article prior to the effective date of this ordinance is hereby deemed to be holding a permit as required under this Section. (Amended by Ord. 270-82, App. 6/10/82)

SEC. 869.1. PENALTY. (a) Any person who shall violate the provisions of Sections 869 through 869.15 of this Article shall be guilty of an infraction or a misdemeanor. If charged as an infraction, the penalty shall be as follows:

(1) Upon a first conviction thereof, such person shall be punished by a fine not to be less than $50 nor to exceed $500.

(2) Upon a second conviction thereof, such person shall be punished by a fine not to be less than $250 nor to exceed $500.

(3) Upon a third conviction thereof, such person shall be punished by a fine not to be less than $400 nor to exceed $500.

If charged as a misdemeanor, the penalty therefor shall be by imprisonment in the County Jail not exceeding six months or a fine not exceeding $500. The complaint charging such violation shall specify whether the violation charged is a misdemeanor or an infraction.

(b) In addition to the penalty set forth above in Section 869.1(a), any person who shall violate any provision of Sections 869 through 869.15 shall be subject to revocation or suspension of any permit issued by the City and County, following adequate notice and a hearing before the Chief of Police or a designate. (Amended by Ord. 270-82, App. 6/10/82)

SEC. 869.2. LIMITATION ON ISSUANCE OF PERMITS. (a) The Chief of Police may issue a permit for a location, which location shall not be within two blocks or 600 feet, whichever is greater, of an established business which sells the same type of food or other merchandise as intended by said applicant, or of any location previously established and currently being operated by a licensed peddler selling the same type of food or other merchandise as intended by said applicant.

(b) This ordinance does not apply to those peddlers and street artists regulated by Articles 24, 24.1 and 24.2 of this Code. (Amended by Ord. 270-82, App. 6/10/82)

SEC. 869.3. LOCATION RESTRICTIONS. The Chief of Police may issue a peddler permit only when he finds that the following location and time requirements are met:

(a) The location shall:

(1) Leave unobstructed for pedestrian passage on any sidewalk a space not less than 10 feet wide.

(2) Not occupy a space extending more than 4-1/2 feet from the curb line of any sidewalk, nor wider than four feet nor extending more than five feet above the sidewalk.

(3) Not be within 18 inches of the curb line of any sidewalk.

(4) Not be closer than 7-1/2 feet from sprinkler inlets, and wet and dry standpipe inlets, measured from the outer edge of the standpipe bank from the building line to the sidewalk edge.

(5) Not be within 12 feet of the outer edge of any entrance way to any building or facility used by the public including but not limited to doors, driveways and emergency exits measured in each direction parallel to the building line and thence at a 90 degree angle to the curb.

(6) Not be on any sidewalk adjacent to a curb which has been duly designated pursuant to local ordinance or regulation as a white, yellow, blue, or red zone, or a bus zone.

(7) Not be within five feet of any crosswalk or fire hydrant.

(8) Leave unobstructed fire escapes, underneath and perpendicular from the building to the street, five feet from both ends of the fire escape.

(9) Not be within five feet of inflammable liquid vents and fill pipes when tanks are not being filled nor within 25 feet while tanks are being filled.

(b) No peddler shall peddle goods, wares or merchandise between the hours of 12:00 a.m. (midnight) and 6:00 a.m. the following day.

(c) Notwithstanding any other provision of this Code, no peddler or pushcart peddler, as defined in Section 1330 of the San Francisco Police Code, shall peddle goods, wares or merchandise:

(1) In any "P" district, as defined in Section 234 of the City Planning Code (Part II, Chapter II, San Francisco Municipal Code), located on Twin Peaks or in any areas in or adjacent to Open Space Districts located on Twin Peaks.

(2) On the north side of Jefferson Street between Jones and Taylor. (Added by Ord. 270-82, App. 6/10/82; amended by Ord. 204-87, App. 6/3/87; Ord. 317-87, App. 7/24/87; Ord. 294-90, App. 8/1/90)

SEC. 869.4. PEDDLER PERMIT TO NATURAL PERSON ONLY. No peddler permit granted pursuant to Section 869 of this Article shall be issued except to an individual natural person and in no event to any business, firm, partnership or corporation. No more than one permit shall be issued to any one person. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.5. PEDDLER TO PERSONALLY PEDDLE. No person shall be granted a peddler permit pursuant to Section 869 of this Article unless the applicant has declared under penalty of perjury his or her intention to personally operate under the permit for at least 50 percent of the actual hours of operation. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.6. LOG TO BE MAINTAINED. Every person who shall be granted a peddler permit pursuant to Section 869 of this Article shall maintain a log on a form approved by the Chief of Police indicating the day, date

and hours of operation at the authorized location, including the name of the person or persons operating during those times. The log for the 30 previous calendar days shall be kept in the possession of the peddler or peddler employee at all times while operating and shall be open to inspection by any police officer or any Health Department inspector of the City and County of San Francisco. Said log shall be retained by the peddler for a period of one year. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.7. APPLICATION FOR PEDDLER PERMIT. Every person desiring a peddler permit pursuant to Section 869 of this Article shall file an application with the Chief of Police upon a form provided by the Chief of Police requiring the applicant to submit:

(a) Two photographs of the applicant 1" x 1" in size.

(b) A statement of the specific location where the applicant proposes to operate, the days of the week, and time(s) of the day of intended operation, and the specific item or items to be sold, which shall be the only item(s) sold under the permit.

(c) A set of fingerprints as required by the Chief.

(d) Such other relevant information deemed pertinent by the Chief of Police. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.8. INSPECTION BY HEALTH DEPARTMENT. No permit to peddle food products for human consumption in the City and County of San Francisco shall be granted unless the applicant has been issued a Certificate of Sanitation by the Director of Public Health. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.9. PEDDLER EMPLOYEE. No peddler may employ at any one time more than one peddler employee. The only exception to this prohibition is employment by a peddler of persons who have peddler employee permits authorizing employment by that peddler, which permits were issued prior to the effective date of this ordinance. Every person desiring a peddler employee permit shall file an application with the Chief of Police upon a form provided by said Chief of Police. Application shall be accompanied by:

(a) Signed statement from the permittee peddler verifying his intention to employ the applicant, and indicating specific location where the peddler employee will peddle.

(b) Two photographs of the applicant 1" x 1" in size.

(c) A set of fingerprints as required by the Chief of Police.

(d) Such other relevant information deemed pertinent by the Chief of Police. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.10. OPERATION OF PEDDLER EMPLOYEE. In no case shall the peddler employee operate, at the same time as the permit holder is operating, at any location other than the location at which the permit holder is operating. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.11. FEES – PEDDLER AND PEDDLER EMPLOYEE. Every applicant for a peddler or peddler employee permit shall pay a filing fee as specified in Section 2.26 of Part II, Chapter VIII of the San Francisco

Municipal Code (Police). (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.12. PEDDLERS, PEDDLER EMPLOYEES, LICENSE FEE. Every person granted a peddler permit or peddler employee permit to peddle goods, wares or merchandise, or fish, vegetables or fruit, or food products for human consumption, or any other article in any manner, shall pay to the Tax Collector an annual license fee, as specified in Section 2.27 of Part II, Chapter VIII of the San Francisco Police Code, payable in advance. In calculating the fees earned herein by the Health Department pursuant to the provisions of Section 6.402 of the Charter of the City and County of San Francisco, a percentage of the license fee shall be credited to said Department pursuant to the annual determination by the Controller as provided by Section 2.21 of this Code. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.13. LICENSE FEES – PRORATION SCHEDULE – DATE PAYABLE. All licenses issued under the provisions of Section 869.12 shall be due and payable, on a calendar year basis, prorated with regard to the calendar year on a monthly basis. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.14. PEDDLERS, FREE. The Tax Collector may issue a free or gratuitous license to a person liable to pay the license tax required by Section 869.12 and set by Section 2.27 of this Code when the Chief of Police shall have certified that it has been shown by good and sufficient evidence that the person applying for said license was a soldier, sailor or marine of the United States who received an honorable discharge or a release from active

duty under honorable conditions from such service or that he or she is physically and absolutely unfitted to earn a livelihood by any other means. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.15. IDENTIFICATION CARD. The Chief of Police shall issue to each peddler and peddler employee an identification card which shall contain a photograph of the permittee with the number of the permit in figures plainly discernible. The Chief of Police shall determine the manner and form of any other information that may be placed upon this identification card. Such identification card shall be in the possession of the peddler or peddler employee at all times while operating, and shall be immediately produced upon request to any police officer or Health Department inspector. Peddlers and peddler employees shall return to the Police Department the identification card upon discontinuance of operation, revocation or suspension of permit, or upon termination of the peddler employee. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.16. RULES AND REGULATIONS BY CHIEF OF POLICE OR DIRECTOR OF PUBLIC HEALTH. The Chief of Police or the Director of Public Health may adopt, after a noticed public hearing, rules and regulations supplemental to this ordinance and not in conflict therewith. The rules and regulations shall become effective 10 days following the adoption by either the Chief of Police or the Director of Public Health. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.17. SUSPENSION AND REVOCATION OF PERMIT. The Chief of Police may suspend or revoke any

peddler or peddler employee permit if he finds, after a noticed public hearing, that any of the following conditions exist:

(a) Fraud, misrepresentation of false statement contained in the application for permit.

(b) Violation of provisions of this Article or the San Francisco Municipal Code regarding peddling.

(c) Peddling by a peddler employee at a location not approved by the Chief of Police.

(d) Conviction of a felony if the crime was committed during the time the permittee was working under the permit or relates to the business conducted under the permit and endangers the health and safety of the public.

(e) Violations of provisions of the Municipal Traffic Code or the California Vehicle Code, relating to the operation of the permit.

(f) Conduct violating any City ordinance or state statute which conduct occurred during the time the permittee was working under the permit or which conduct relates to the business conducted under the permit and endangers the health and safety of the public.

(g) Failure to pay the required license fee.

(h) Operation under the peddler's permit of a business other than that for which the permit was issued. (Added by Ord. 270-82, App. 6/10/82)

SEC. 869.18. SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Article or any part thereof, is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this Article or any part thereof. The Board of

Supervisors hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared unconstitutional or invalid or ineffective. (Added by Ord. 270-82, App. 6/10/82)

APPENDIX F

SAN FRANCISCO POLICE CODE

ARTICLE 17.3

PERMIT REGULATIONS FOR PUSHCART PEDDLERS AND PUSHCART OPERATORS CONCERNING PRODUCTS FOR HUMAN CONSUMPTION.

Sec. 1330.	Definitions.
Sec. 1330.1.	Permit Required.
Sec. 1330.2.	Pushcart Peddler Filing and Fee Provision.
Sec. 1330.3.	Pushcart Peddler Application Form.
Sec. 1330.4.	Regulating Pushcart Peddler Locations; Exceptions.
Sec. 1330.5.	Pushcart Peddler Applications – Reference to Director of Health.
Sec. 1330.6.	Notice of Hearing for Pushcart Peddlers.
Sec. 1330.11.	Pushcart Employees to Operate Only in Conjunction with Pushcart Peddler Permit.
Sec. 1330.12.	Exhibition of Pushcart Peddler Permit.
Sec. 1330.13.	Pushcarts – Inspections.
Sec. 1330.14.	Pushcarts – Decal and Display.
Sec. 1330.15.	Issuance of Pushcart Peddlers Permit.
Sec. 1330.15.1.	Pushcart Operator; License Fee.
Sec. 1330.16.	Suspension and Revocation of Permits.
Sec. 1330.17.	Nontransfer of Pushcart Peddler Permit.
Sec. 1330.19.	Time Limit for Issuance of Pushcart Peddler Permits to Existing Peddler Permit Holders.
Sec. 1330.20.	Penalty.
Sec. 1330.21.	Severability.

SEC. 1330. DEFINITIONS. For the purpose of this Article the following words and phrases mean and include:

(a) **Pushcart.** Any wagon, cart, or any other food-serving device, whether stationary or movable, wherein or wherefrom any food or foodstuffs are sold, served, distributed, offered for sale at retail, or given away to the public, whether consumed at said pushcart or elsewhere, except that this Article shall not apply to any license provided by Section 869 or Article 17.2 of this Code.

(b) **Pushcart Peddler.** Any person engaged in the business of operating a pushcart within the City and County of San Francisco.

(c) **Pushcart Employee.** Any person hired or employed to operate a pushcart within the City and County of San Francisco.

(d) **Person.** An individual or natural person.

(e) **Chief of Police.** The Chief of Police of the City and County of San Francisco or a designated representative of the Chief of Police.

(f) **Director.** The Director of Health of the City and County of San Francisco or a designated representative of the Director.

(g) **Tax Collector.** The Tax Collector of the City and County of San Francisco. (Amended by Ord. 257-84, App. 5/31/84)

SEC. 1330.1. PERMIT REQUIRED. It shall be unlawful for any person, firm or corporation to engage in or carry on the business of pushcart peddler, or to operate, or cause or permit to be operated any pushcart upon any public street, sidewalk, alley, or any other public place in the City and County of San Francisco, without first having obtained a permit from the Chief of Police after approval by the Director. (Added by Ord. 39-81, App. 1/15/81)

SEC. 1330.2. PUSHCART PEDDLER FILING AND FEE PROVISION. Every person desiring a pushcart peddler permit pursuant to this Article shall file an application with the Chief of Police upon a form provided by said Chief of Police and shall pay a filing fee which shall not be refundable. The permit application fee shall be allocated between the Police Department and the Department of Public Health by the Controller according to the cost incurred by each department in processing this application.

No pushcart peddler permit shall be issued except to a person and in no case to any business, firm, partnership or corporation. A person shall be issued only one pushcart peddler permit. (Amended by Ord. 555-81, App. 11/12/81)

SEC. 1330.3. PUSHCART PEDDLER APPLICATION FORM. Except as otherwise provided herein, an application for a pushcart peddler permit pursuant to the provisions of this Article shall specify:

(a) The name, business and residence address of the applicant.

(b) A description of the food product or products the applicant intends to sell.

(c) The specific location of the peddling activity, including a detailed description of where the applicant intends to place his or her pushcart. Each permit issued pursuant to this Article shall be valid for only one specified peddling location.

(d) Whether or not the applicant intends to operate a pushcart peddler business under a fictitious name.

(e) All criminal convictions except traffic infractions.

(f) Such information pertinent to the operation of the proposed activity not inconsistent with this Article as the Chief of Police or Director may require of an applicant in addition to the other requirements of this Section.

(g) The address to which notice, when required, is to be sent or mailed, and the name and address of a person authorized to accept service of process, if not otherwise set forth herein.

(h) Whether the application is for a new permit, or for a change of location or addition of products of an existing permit.

(i) Two recent portrait photographs of the applicant at least 2" x 2" shall accompany the application.

(j) Nothing contained herein shall be construed to deny the Chief of Police the right to take the fingerprints of the applicant. (Added by Ord. 39-81, App. 1/15/81)

SEC. 1330.4. REGULATING PUSHCART PEDDLER LOCATIONS; EXCEPTIONS. Every person desiring a permit pursuant to this Article shall conform to the regulations set forth in Section 869.3, Article 13, of the San Francisco Police Code, provided, however, that permit holders as of May 17, 1983, shall be exempt from the provisions of Section 869.3 of this Code. (Amended by Ord. 257-84, App. 5/31/84)

SEC. 1330.5. PUSHCART PEDDLER APPLICATIONS – REFERENCE TO DIRECTOR OF HEALTH. When an application is filed for a new pushcart peddler permit, or for addition of products or change of location of an existing permit, under this Article, the Director shall make or cause to be made an investigation into the applicant's proposed pushcart peddling operation for the purpose of determining that said operation conforms

with the provisions of this Article and to all applicable State and local laws. Upon the conclusion of his investigation, the Director shall make his recommendation to the Chief of Police within 30 days after the filing of such application with the Police Department. (Added by Ord. 39-81, App. 1/15/81)

SEC. 1330.6. NOTICE OF HEARING FOR PUSHCART PEDDLERS. When an application is filed for a new pushcart peddler permit under this Article, or for addition of products or change of location of an existing permit, the Chief of Police shall fix a time and place for a public hearing. Such hearing shall be scheduled not less than 15, nor more than 30, days from the date of report by the Director.

Not less than 10 days before the date of such hearing, the Chief of Police shall cause to be published a notice of such hearing in the official newspaper of the City and County of San Francisco. The cost of publishing said notice shall be borne by the pushcart peddlers permit applicant. The Chief of Police shall maintain a file of the names and addresses of all persons wishing to receive notice by mail of any application filed pursuant to this Article. Not less than 10 days before the date of such hearing, the Chief of Police shall cause to be mailed notice of such hearing to all persons requesting to be so notified. Such notices published or mailed pursuant to this Section shall contain the following: the name and business address of the applicant, the product or products to be sold, the location of the proposed sales activity, the days and hours of operation, and whether the application is for a new permit or for a change of an existing permit. (Added by Ord. 39-81, App. 1/15/81)

SEC. 1330.7. PUSHCART EMPLOYEES – PERMIT REQUIRED. No person shall be employed to operate any pushcart upon any public street, sidewalk, alley, or other public place in the City and County of San Francisco, unless he or she holds a pushcart employees permit from the Chief of Police and a Tax Collector's license as required in Section 1330.15.1 of this Article. (Amended Ord. 381-83; App. 6/30/83)

SEC. 1330.8. PUSHCART EMPLOYEE – APPLICATION FORM. Each applicant for a pushcart employee's permit, as required by Section 1330.7 of this Article, shall file an application with the Chief of Police, upon a form provided by said Chief and shall furnish the following information:

(a) Name and residence address.

(b) Written proof that the applicant is at least 16 years of age.

(c) Applicant's weight, height, and color of eyes and hair.

(d) Place of birth.

(e) Whether a citizen of the United States.

(f) All criminal convictions, except traffic infractions.

(g) Such other information pertinent to the operation of the proposed activity, not inconsistent with this Article, as the Chief of Police or Director may require of any applicant.

(h) The applicant may be subject to fingerprint identification.

(i) A filing fee shall accompany the application. (Amended Ord. 555-81; App. 11/12/81)

SEC. 1330.9. PHOTOGRAPH OF PUSHCART EMPLOYEE APPLICANT - FILED WITH POLICE DEPARTMENT. Each applicant for a pushcart employee's permit, as required by Section 1330.7 of this Article, must file with his or her application two recent photographs of himself or herself of a size that may easily be attached to his permit, one of which shall be attached to his or her permit when issued, and carried by such person at all times when operating a pushcart, and the other shall be filed with his or her application with the Police Department of the City and County of San Francisco. The photograph shall be so attached to the permit that it cannot be removed and another substituted without detection. Each pushcart employee shall, upon demand by any police officer, exhibit his or her permit and photograph for inspection. *(Added Ord. 39-81; App. 1/15/81)*

SEC. 1330.10. RENEWAL OF PUSHCART EMPLOYEE PERMIT - PROCEDURE. Pushcart employee permits will automatically be renewed upon payment of the annual license fee by the 1st day of January of each year, and shall be valid, unless revoked by the Chief of Police pursuant to the provisions of this Code. *(Amended Ord. 381-81; App. 6/30/83)*

SEC. 1330.11. PUSHCART EMPLOYEES TO OPERATE ONLY IN CONJUNCTION WITH PUSHCART PEDDLER PERMIT. Pushcart employees, who may be no less than 16 years old, shall be unrestricted as to location, days and times of operation, and no permit or license shall be required for pushcart employees, provided that said employee is operating at an approved location as set

forth in a valid pushcart peddler permit issued pursuant to this Article. (Amended by Ord. 257-84, App. 5/31/84)

SEC. 1330.12. EXHIBITION OF PUSHCART PEDDLER PERMIT. Upon demand by any police officer, each pushcart peddler or pushcart employee shall exhibit the pushcart peddler permit and Tax Collector's license so that the location of the pushcart may be checked and verified. (Amended by Ord. 257-84, App. 5/31/84)

SEC. 1330-13. PUSHCARTS – INSPECTIONS. All pushcarts having a permit issued pursuant to this Article and the Director's approval to operate with the City shall be subject to inspection and issuance of a new Certificate of Sanitation at a time designated by the Director and at the location of said pushcart as specified in said permit. (Added by Ord. 39-81, App. 1/15/81)

SEC. 1330.14. PUSHCARTS – DECAL AND DISPLAY. The Director shall annually issue a Certificate of Sanitation as a decal which shall be affixed to a permanent holder designed to display such decal. The number assigned to each pushcart shall be forwarded to the Chief of Police. (Added by Ord. 39-81, App. 1/15/81)

SEC. 1330.15. ISSUANCE OF PUSHCART PEDDLERS PERMIT. The Chief of Police may issue a pushcart peddler permit pursuant to this Article within 14 days following a hearing as provided herein, based on his investigation and the investigation of the Director, if he finds:

(a) That the operation, as proposed by the applicant, would comply with all applicable laws, including but not limited to, the provisions of this Article and the San Francisco Municipal Code.

(b) That the applicant who will be directly engaged in the operation of the business of pushcart peddling has not been convicted of a felony.

(c) That the applicant has not made any false, misleading or fraudulent statements of facts in the permit application or any other document required by the Chief of Police or the Director in conjunction therewith.

(d) That the applicant's proposed operation is not located within two blocks or 600 feet, whichever is greater, of an established business which sells the same type of food product or other merchandise or similar service as intended by said applicant, or of any location previously established and currently being operated by a licensed peddler or pushcart peddler selling the same type of food product or other merchandise or similar service as intended by said applicant.

(e) Pushcart peddler permit holders on July 28, 1983, shall not be subject to the provisions of Section 1330.15(d) with respect to any product currently sold or which may in the future be sold at the location presently allowed under that permit. (Amended by Ord. 257-84, App. 5/31/84)

SEC. 1330.15.1. PUSHCART OPERATOR; LICENSE FEE. Every person granted a pushcart operator permit pursuant to this Article shall pay to the Tax Collector an annual license fee. (Added by Ord. 555-81, App. 11/12/81)

SEC. 1330.16. SUSPENSION AND REVOCATION OF PERMITS. The Chief of Police and/or the Director may suspend or revoke for good cause any permit of the holder thereof, which has been issued pursuant to this Article, if he finds, after a noticed public hearing, that

such permit holder has engaged in or been found guilty of any of the following acts:

(a) Fraud, misrepresentation, or false statement contained in the application for permit.

(b) Violation of provisions of this Article or the San Francisco Municipal Code.

(c) Conviction of a felony. (Added by Ord. 39-81, App. 1/15/81)

SEC. 1330.17. NONTRANSFER OF PUSHCART PEDDLER PERMIT. A pushcart peddler permit issued pursuant to this Article shall not be transferable except where the transfer is to the spouse, child or children of a permit holder by testate or intestate succession, or to the spouse of a permit holder pursuant to a marital settlement agreement, with the consent of the Chief of Police. (Added by Ord. 39-81, App. 1/15/81)

SEC. 1330.19. TIME LIMIT FOR ISSUANCE OF PUSHCART PEDDLER PERMITS TO EXISTING PEDDLER PERMIT HOLDERS. All persons who possess outstanding police peddler permits for the peddling of food products for human consumption shall be issued pushcart peddler permits pursuant to this Article within 30 days of the effective date of this Article. (Added by Ord. 39-81, App. 1/15/81)

SEC. 1330.20. PENALTY. Any person who violates any provision of this Article shall be deemed guilty of a misdemeanor and upon such conviction such person shall be punished by a fine of not to exceed $500 or by imprisonment in the County Jail for a period not to exceed six months or by both such fine and imprisonment. (Added by Ord. 39-81, App. 1/15/81)

SEC. 1330.21. SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Article or any part thereof, is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this Article or any part thereof. The Board of Supervisors hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase thereof irrespective of the fact that any one or more section, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared unconstitutional or invalid or ineffective. (Added by Ord. 39-81, App. 1/15/81)

APPENDIX G

SAN FRANCISCO POLICE CODE
ARTICLE 24

REGULATING STREET ARTISTS

Sec. 2400. Statement of Purpose and Text of Street Artist Ordinance.
Sec. 2401. Additional Definitions.
Sec. 2402. Compensation of Advisory Committee.
Sec. 2403. Age Eligibility for Street Artists.
Sec. 2404. Street Artist Certificate: Disclaimer, Transfer, and Display.
Sec. 2404.1. Street Artist Certificate: Fee.
Sec. 2404.2. Fee Setting Procedure.
Sec. 2404.3. Street Artist Certificate: Priority to Veterans.
Sec. 2405. Regulations for Street Artists.
Sec. 2406. Lottery.
Sec. 2407. Director of Public Works to Provide Markings.
Sec. 2408. Issuance, Denial, Suspension or Revocation of Certificate: Appeals.
Sec. 2409. Appeals to Board of Permit Appeals.
Sec. 2410. Criminal Violations: Penalties.
Sec. 2411. Severability.

SEC. 2400. STATEMENT OF PURPOSE AND TEXT OF STREET ARTIST ORDINANCE. This ordinance is enacted to implement an initiative ordinance approved by the electors of San Francisco as Proposition "L" at the election held on November 4, 1975. The provisions of Proposition "L" are set forth herein for convenience and may only be amended by the electors of San Francisco. Proposition "L" reads as follows:

REGULATING STREET ARTISTS AND CRAFTPERSONS.

SEC. 1	Definitions.
SEC. 2	Advisory Committee of Street Artists and Crafts Examiners; Establishment; Appointments; Compensation; Terms; Chairperson; Secretary
SEC. 3	Application
SEC. 4	Examination
SEC. 5	Issuance of Certificate
SEC. 6	Certificate Fee: Period
SEC. 7	Regulating Street Artists and Craftspersons
SEC. 8	Designation of Sales Areas
SEC. 9	Repeal

"**SEC. 1. DEFINITIONS.** For the purposes of this ordinance the following words or phrases shall mean or include:

(a) "Art Commission." The Art Commission of the City and County.

(b) "Advisory Committee." The Advisory Committee of Street Artists and Crafts Examiners of the City and County.

(c) "City and County." The City and County of San Francisco.

(d) "Family Unit." Two or more persons jointly engaged in the creation or production of an art of craft item, no one of whom stands in an employer-employee relationship to any of the other members thereof, or, two or more physically or mentally handicapped persons participating in a formal rehabilitation program a part of which includes activities for the creation of arts and crafts by said persons.

(e) "Person." Any individual, copartnership, firm, association, joint stock company, corporation, or combination of individuals of whatever form or character; provided, however, that whenever a right, privilege, or power is conferred upon a person by the provisions of this ordinance, the term "person" shall mean an individual natural person.

"SEC. 2. ADVISORY COMMITTEE OF STREET ARTISTS AND CRAFTS EXAMINERS; ESTABLISHMENT; APPOINTMENTS; COMPENSATION; TERMS; CHAIRPERSON; SECRETARY. There is hereby established an Advisory Committee of Street Artists and Crafts Examiners, who shall advise the Art Commission on matters relating to the wares produced by street artists and to perform such other functions as shall from time to time be deemed appropriate by the Commission. The Advisory Committee shall consist of five members to be appointed by the Mayor. Four of said members shall be experienced artists or craftspersons and each such member shall be appointed from among three persons whose names shall have been submitted to the Mayor for appointment by the Art Commission, and one of the members shall be an art educator. Each member shall be compensated for the time he or she spends in this capacity as assigned by the Chairperson at a rate of pay to be established from time to time by the Board of Supervisors. The term of each member shall be two years, provided that the five members first appointed by the Mayor shall, by lot, classify their terms so that the terms of two members shall be for a period of one year and the terms of three members shall be for a period of two years, and upon the expiration of these and successive terms, the Mayor shall appoint their

successors for a two-year term in a manner similar to that described herein for the initial members. In the event a vacancy occurs during the term of office of any member, the Mayor shall appoint for the unexpired term of the office vacated, a successor in a manner similar to that described herein for the initial members. The advisory Committee shall elect from its members a Chairperson and a Secretary to hold office for one year, or until their successors are duly elected and qualified. The Secretary shall keep an accurate record of all proceedings of the Advisory Committee which shall be open to inspection by the public at all times.

"**SEC. 3. APPLICATION.** Every person desiring certification as a street artist or craftsperson pursuant to this ordinance shall file an application with the Art Commission upon a form provided by said Commission. Except as otherwise provided herein, said application shall specify:

(a) The applicant's residence address, place of employment where the work of art is produced and the mailing address of a person through whom the applicant may always be reached shall appear on the application.

(b) A description of the art or craft item for which the applicant seeks certification.

(c) A declaration under penalty of perjury that the art or craft item for which applicant seeks certification is of the applicant's own creation or the creation of the applicant's family unit, and that the applicant neither employs other persons nor is employed by another person in the production of the art of craft item for which applicant seeks certification.

"SEC. 4. EXAMINATION. Upon receipt of an application filed pursuant to this ordinance, the Executive Director of the Art Commission shall fix a date for Advisory Committee consideration and action upon said application and shall notify the applicant of said date. In its consideration of an application, the Art Commission shall examine representative samples of the applicant's work for the purposes of verifying the information set forth in the application. After such examination, and for the purposes of further investigation, the Art Commission may designate one or more of its members to visit the studio or workshop of the applicant to view the applicant's facilities and to further verify that the art or craft item for which the applicant seeks certification is his or her own creation or those of his or her family unit.

"SEC. 5. ISSUANCE OF CERTIFICATE. If the applicant's examination is satisfactory, and if no charges of deception resorted to in obtaining the certificate, or any other violation of the applicable provisions of the San Francisco Municipal Code, have been filed with the Commission, upon payment of the certificate fee fixed by this ordinance, the Executive Director of the Art Commission shall issue a certificate to the applicant, duly signed, and shall show therein that the person named therein passed the examination and is entitled to engage in the display and sale of the specific art or craft item set forth in said certificate in accordance with the provisions of this ordinance.

"SEC. 6. CERTIFICATE FEE; PERIOD. The fee for any certificate issued pursuant to the provisions of this

ordinance shall be $20 and said certificate shall be valid for a period of three months from the date of issuance.

"SEC. 7. REGULATING STREET ARTISTS AND CRAFTSPERSONS. (a) It shall be unlawful for any person to sell, offer for sale, expose for sale, or solicit offers to purchase, any art or craft work of the person's own creation on any public street or public place where such activities are permitted, unless duly certified as a street artist or craftsperson pursuant to the provisions of this ordinance, or duly licensed as a peddler pursuant to the provisions of Section 869 of Part II, Chapter VIII of the San Francisco Municipal Code (Police Code).

(b) It shall be unlawful for any person certified as a street artist or craftsperson pursuant to the provisions of this ordinance to sell, offer for sale, exposes for sale, or solicit offers to purchase, any art or craft work of the person's own creation on any public street or public place where such activities are not permitted, unless duly licensed as a peddler pursuant to the provisions of Section 869 of Part II, Chapter VIII of the San Francisco Municipal Code (Police Code).

(c) All or part of funds derived from the fees paid by street artists and craftspersons may be assigned by the Board of Supervisors to the Art Commission for use in paying members of the Advisory Committee as set forth in Section 2 above and to the San Francisco Police Department for enforcement of this proposition.

"SEC. 8. DESIGNATION OF SALES AREAS. The Board of Supervisors, by resolution after public hearings thereon, may designate areas in or on any public street or public place where any street artist or craftsperson certified pursuant to the provisions of this ordinance may sell,

offer for sale, expose for sale, or solicit offers to purchase any art or craft item of his or her own creation, provided, however, that any designation of an area in a public place under the jurisdiction of an officer, board or commission of the City and County shall be subject to the approval of such officer, board or commission. In designating such areas, the Board of Supervisors may impose such conditions and limitations as, in its discretion, are necessary to prevent any undue interference with normal pedestrian or vehicular traffic, or any damage to surrounding property, including interference with use, view or enjoyment of public parks.

"**SEC. 9. REPEAL.** The initiative ordinance relative to permits and licenses for street artists, approved by the electorate as proposition "L," on the ballot for the election held in the City and County of San Francisco on June 4, 1974, is hereby repealed." (Amended by Ord. 41-83, App. 2/4/83)

SEC. 2401. ADDITIONAL DEFINITIONS. For the purpose of administering Proposition "L", the following words or phrases shall mean or include:

(a) "Art" or "craft." The terms "art" or "craft" do not include any item intended or suitable for human consumption.

(b) "Handcrafted Item." An item predominantly created or significantly altered in form by the street artist.

(c) "Proposition 'L'." Proposition "L" on the November 4, 1975 ballot in San Francisco, an initiative ordinance.

(d) "Street Artist." Any person who has been certified as a Street Artist or craftsperson pursuant to the provisions of Proposition "L".

(e) "Street Artist Certificate." A certificate issued by the Art Commission pursuant to the provisions of Proposition "L" and this Article. (Amended by Ord. 41-83, App. 2/4/83)

SEC. 2402. COMPENSATION OF ADVISORY COMMITTEE. Pursuant to the provisions of Section 2 of Proposition "L", the compensation of the appointive members of the Advisory Committee of Street Artists and Crafts Examiners shall be as follows:

(a) A member shall receive $50 for each meeting of the Advisory Committee actually attended by said member for 50 percent of each meeting of four or more hours.

(b) A member shall receive $50 for each visit to the studio or workshop of an applicant for a street artist certificate for the purpose of viewing the applicant's facilities and verifying that the art or craft for which the applicant seeks certification is his or her own creation or those of his or her family unit, or for the performance of such other functions as shall from time to time be deemed appropriate by the Arts Commission.

(c) In no event shall the aggregate amount paid each member exceed 25 meetings/studio visits or $1,250 per year. (Amended by Ord. 418-84, App. 10/5/84; Ord. 345-90, App. 10/12/90)

SEC. 2403. AGE ELIGIBILITY FOR STREET ARTISTS. No person under the age of 16 is eligible for certification as a street artist. (Amended by Ord. 41-83. App. 2/4/83)

SEC. 2404. STREET ARTIST CERTIFICATE: DISCLAIMER, TRANSFER, AND DISPLAY. (a) **Disclaimer.** On each Street Artist Certificate the following words shall appear:

> "The issuance of this Certificate does not constitute an endorsement by the City and County of San Francisco or the Article sold pursuant to the terms of this Certificate."

(b) **Transfer.** Any Street Artist Certificate issued pursuant to the terms of this Article cannot be transferred to any other person as defined in Proposition "L".

(c) **Display.** The Art Commission shall issue to each Street Artist a Certification Card which shall contain a photograph of the Street Artist, the certificate number of all members of the family unit and the number of the certificate in figures plainly discernible. The Art Commission, or its designee, shall determine the manner and form of any other information that may be placed upon this Certification Card. The Certification Card shall be displayed by the Street Artist at all times when said Street Artist is selling or soliciting offers to purchase any art or craft work. The photograph shall be furnished by the Street Artist. (Amended by Ord. 41-83, App. 2/4/83)

SEC. 2404.1. STREET ARTIST CERTIFICATE: FEE. Pursuant to the provisions of Proposition K, adopted by the voters at an election held on November 8, 1983, the Board of Supervisors hereby establishes the fee for a Street Artist Certificate to be as follows: The fee for a Street Artist Certificate shall be $87.50 and said certificate shall be valid for a period of three months from the date of issuance; except that any person certified as a street artist pursuant to the provisions of this Article shall have

the option of purchasing for $350 a certificate valid for a period of one year from the date of issuance. (Added by Ord. 511-84, App. 12/21/84; amended by Ord. 295-88, App. 6/29/88; Ord. 216-91, App. 6/12/91)

SEC. 2404.2. FEE SETTING PROCEDURE. Each year the Arts Commission shall cause a report to be made of the revenues collected for Street Artist Certificates, the costs incurred in administering and enforcing the provisions of the Street Artist Ordinance (Proposition "L" adopted by the electors of San Francisco at the election held on November 4, 1975), the anticipated costs for the ensuing year, and the fee which would be necessary to support such costs. Said report shall be filed with the Controller no later than April 1st of each year pursuant to the provisions of Section 3.17-2 of the San Francisco Administrative Code. The Controller shall file said report with the Board of Supervisors no later than May 15th of each year and the Board of Supervisors shall, by ordinance, establish or readjust the fee for a Street Artist Certificate. The fee set shall be equal to, but not greater than, the fees necessary to support the costs of administering and enforcing the provisions of the Street Artist Ordinance. (Added by Ord. 511-84, App. 12/21/84)

SEC. 2404.3. STREET ARTIST CERTIFICATE: PRIORITY TO VETERANS. In fixing a date for Advisory Committee consideration and action upon an application for a Street Artist Certificate, pursuant to Section 4 of Section 2400 of this Article, the Arts Commission shall grant priority to an applicant who submits with his or her application good and sufficient evidence establishing that he or she served as a member of the armed forces of the United States who received an honorable discharge or a

release from active duty under honorable conditions from said service.

The provisions of this Section shall expire on December 1, 1986, unless reauthorized by the Board of Supervisors upon the recommendation of the Arts Commission, and shall be subject to review by the Board of Supervisors in November, 1986. (Amended by Ord. 415-86, App. 10/10/86)

SEC. 2405. REGULATIONS FOR STREET ARTISTS. (a) Street artists shall sell, offer for sale or solicit offers to purchase only for those specific handcrafted art or craft items created personally by the street artist or the street artist's family unit for which the street artist has been certified.

(b) Street artists shall sell, offer for sale or solicit offers to purchase only in those areas designated by the Board of Supervisors by Resolution.

The designation of any area in a public place under the jurisdiction of an officer, board or commission of the City and County is subject to the approval of, and to rule or regulations imposed by, such officer, board or commission.

(c) In areas designated by the Board of Supervisors which are not under the jurisdiction of an officer, board or commission of the City and County, street artists shall sell, offer for sale or solicit offers to purchase subject to the following regulations:

(1) No more than 4-1/2 feet from the curb line of any sidewalk.

(2) Not within 18 inches of the curb line of any sidewalk.

(3) No more than five feet above any sidewalk.

(4) In an area not more than four feet long.

(5) Sprinkler inlets, standpipe inlets (both wet and dry) are to be kept clear for 7-1/2 feet on each side, measured from the outer edge of standpipe bank from the building line to the sidewalk edge.

(6) Not within 12 feet from the outer edge of any entrance to any building including, but not limited to, doors, driveways, emergency exits measured in each direction parallel to the building line and thence at a 90-degree angle to the curb.

(7) Fire escapes be unobstructed underneath and perpendicular from building to the street five feet from both ends of fire escape.

(8) Not on any sidewalk adjacent to curb which has been duly designated pursuant to local ordinance or regulation as one of the following:

1. White zone
2. Yellow zone
3. Bus zone

(9) Not within five feet of any crosswalk.

(10) Inflammable liquid vents and fill pipes to be kept clear for five feet in both directions on the sidewalk when tanks are not being filled or within 25 feet while tank is being filled.

(11) Not within five feet of the display of any other Street Artist.

(12) Fire hydrants to have five feet sidewalk clearance.

(13) No street artist shall sell, offer to sell, or solicit offers to purchase between the hours of 12:00 a.m. (midnight) and 6:00 a.m. of the following day.

(14) All displays and objects placed in those areas designated by the Board of Supervisors shall be removed by 12:00 a.m. (midnight) and shall not be placed prior to 6:00 a.m. of the following day.

(15) No street artist shall sell, offer for sale, or solicit offers to purchase, from any vehicle.

(16) Street artists shall engage in their activities on the public sidewalks of the City and County of San Francisco in such a manner that at all times there shall remain open for the passage of pedestrians a space of at least 10 feet in width, as measured on a line perpendicular to the curb line, between the edge of the sidewalk farthest from the curb and the edge of the street artist's activities. No portion of a street artist's activities shall be included in measuring the 10-foot clear pedestrian passageway. Notwithstanding the foregoing, the Board of Supervisors, by resolution, may temporarily permit street artists to engage in their activities in specified locations where 10 feet of clear pedestrian passageway cannot be maintained. Such temporary permission may not be granted by the Board of Supervisors for any period exceeding 18 months.

(d) In the Resolution designating or redesignating an area where street artists may sell, offer for sale or solicit offers to purchase, the Board of Supervisors may exempt the area from one or more of the regulations set forth in Subsection (c) above if the Board finds that the exemption will not be inconsistent with or interfere with the purposes of the regulation from which the area is exempted. (Amended by Ord. 388-83, App. 7/14/83)

SEC. 2406. LOTTERY. (a) The Art Commission shall establish and supervise a lottery system whereby those

persons certified by the Art Commission as street artists and possessing a valid State Board of Equalization Resale Permit shall be chosen by lot for the available selling areas as designated by the Board of Supervisors by resolution.

(b) The Art Commission shall specify three days in each week for the holding of a lottery for selling areas which are designated by the Board of Supervisors.

(c) The Art Commission, at its discretion, may postpone any lottery if sufficient volunteers to conduct the lottery are not available. No fees shall be paid to the volunteers conducting the lottery or collected by the Art Commission to establish or supervise the lottery. Each volunteer conducting the lottery shall be compensated for his or her service with a single sales space of the volunteer's choice selected prior to and from the lottery the volunteer conducts and for the duration of the day in which the volunteer conducts the lottery.

(d) The Art Commission shall not be liable for any damage, injury or loss occasioned by the lottery.

(e) The Art Commission may make such reasonable rules and regulations as are necessary to effectuate the lottery.

(f) The Art Commission shall design and distribute to those chosen in the lottery on each day a lottery is held, a document identifying the person chosen, the craft of the person chosen and the location where the person chosen will be allowed to sell, offer for sale, or solicit offers to purchase.

(g) The lottery document shall be in the possession of the street artist at all times and shall be displayed to a police officer upon request.

(h) It shall be unlawful to sell, offer for sale, or solicit offers to purchase goods and crafts in those areas subject to the lottery without first obtaining a document from the Art Commission indicating the seller has been chosen for the area or a document from the Art Commission indicating that no lottery document is necessary for that area. (Amended by Ord. 41-83, App. 2/4/83)

SEC. 2407. DIRECTOR OF PUBLIC WORKS TO PROVIDE MARKINGS. The Director of Public Works shall place identifying markings in public streets or curbs designated as sales areas by the Board of Supervisors. Said markings shall be consistent with the regulations contained in this Article. (Amended by Ord. 41-83, App. 2/4/83)

SEC. 2408. ISSUANCE, DENIAL, SUSPENSION OR REVOCATION OF CERTIFICATE: APPEALS. (a) The issuance of street artist's certificates is governed by Section 5 of Proposition "L". The violation by a street artist of any provision of Proposition "L", this Article or any rules or regulations issued pursuant to this Article of which the person has been given notice, shall be grounds for denial, suspension or relocation, after a public hearing and for good cause shown, of the street artist certificate.

(b) The Art Commission shall adopt rules and regulations governing appeals to the Art Commission from a denial, suspension or revocation of a street artist's certificate. (Added by Ord. 41-83, App. 2/4/83)

SEC. 2409. APPEALS TO BOARD OF PERMIT APPEALS. Appeals to the Board of Permit Appeals from the final decision of the Art Commission to grant, deny, suspend or revoke a Street Artists certificate shall be

governed by Article 1, Section 30 of Part III of the Municipal Code and shall be filed not later than 15 days after the final decision of the Art Commission. (Added by Ord. 41-83, App. 2/4/83; amended by Ord. 255-88, App. 6/22/88)

SEC. 2410. CRIMINAL VIOLATIONS: PENALTIES. (a) Except as provided in Subsection (b), any person violating any provision of Proposition "L," this Article or any rules or regulations issued pursuant to this Article of which the person has been given notice, shall be guilty of an infraction and subject to a fine of not in excess of $100.

(b) The violation of any provision of Proposition "L" or this Article which would otherwise be an infraction shall be a misdemeanor if the person who has violated such provision has previously been convicted of two or more violations within the 12-month period immediately preceding the current offense and the prior convictions are admitted by the person charged with the violations or are alleged in the accusatory pleading. For this purpose, a bail forfeiture shall be deemed to be a conviction of the offense charged. A person convicted of a misdemeanor pursuant to this subsection shall be subject to imprisonment in the County Jail for a period not exceeding 30 days or a fine not exceeding $500, or both. (Added by Ord. 41-83, App. 2/4/83)

SEC. 2411. SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause or phrase in this Article or any part thereof, is for any reason held to be unconstitutional or invalid or ineffective by any court or competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this Article or any part thereof. The Board of

Supervisors hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared unconstitutional or ineffective. (Added by Ord. 41-83, App. 2/4/83)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

CITY AND COUNTY OF SAN FRANCISCO,
Petitioner,
VS.
GUADIYA VAISHNAVA SOCIETY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CITY OF LOS ANGELES

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No. 91-1564

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

CITY AND COUNTY OF SAN FRANCISCO,
Petitioner,
VS.
GUADIYA VAISHNAVA SOCIETY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CITY OF LOS ANGELES

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed pursuant to Rule 36 on behalf of the City of Los Angeles. The City of Los Angeles is a municipal corporation operating under a charter adopted pursuant to California Constitution, art. XI, sec. 3. Charter for the City of Los Angeles was adopted in 1889 and has been amended frequently since that time.

The City of Los Angeles is responsible for administering its own Charter and enforcing the Penal Code of the State of California and the Municipal Code of the City of Los Angeles within its jurisdiction. Respondents in this case assert, and the United States Court of Appeal has ruled, that municipalities are without authority to regu-

late the sale of commercial merchandise on public sidewalks when such merchandise bears any message by a religious or advocacy group. This asserted lack of authority would result in unregulated use of sidewalks akin to commercial bazaars without any regard to public health, safety and welfare. Adoption of such a rule would usurp the ability of local government to exercise its police power in such instances and in other situations which, at most, might tangentially impact on First Amendment related activities. For example building and safety code requirements for book and newspaper printers, theaters and bookstores, penal code requirements controlling distribution of drug paraphernalia, and health code requirements controlling manufacture and distribution of food all would be affected. Cities would be prevented from exercising their police power to protect the public in all such instances.

The City of Los Angeles believes that the opinion of the Ninth Circuit improperly enjoins the enforcement of San Francisco's peddling ordinance by restricting the ability of local government to exercise its police power and regulate commercial activity on sidewalks. Thus, the City of Los Angeles urges this Court to accept the petition for writ of certiorari filed by the City and County of San Francisco and to reverse the judgment entered in this case by the Unites States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

The statement of the case as set forth in Petitioner's Brief in the petition for a writ of certiorari is adopted by the City of Los Angeles for purposes of this brief *amicus curiae*.

SUMMARY OF THE ARGUMENT

The Ninth Circuit incorrectly applied the First Amendment to void the San Francisco ordinance which requires that a permit be obtained by sidewalk vendors who attach noncommercial messages to commercial merchandise (excluding books and purely communicative items) that which is vended on city sidewalks.

The opinion of the Ninth Circuit gives sidewalk vendors who append an incidental noncommercial message to commercial merchandise a subterfuge with which to avoid government regulation of any kind, except very limited time, place and manner regulations. The natural consequence of such a ruling is the appending of such messages to any type of merchandise which would otherwise be regulated, thereby avoiding regulation. Under the opinion, food and drugs can be distributed without appropriate health regulation leading to predictable danger to public health. Weapons, bearing messages, could be sold without the necessary government controls. Owners of buildings dedicated to use by an organization which will sell material imprinted with some message will no longer need appropriate permits to operate or to be erected.

The Supreme Court's decisions governing the interplay of the First Amendment and commercial activity have not expanded the scope of activities protected thereby to eliminate all content neutral government regulation. The decision by the Ninth Circuit has given commercial speech which incidentally includes some expressive activity the expansive protection properly afforded only to freedom of speech protected by the First Amendment.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT CONFER THE RIGHT TO SELL ON THE SIDEWALK COMMERCIAL PRODUCTS WHICH INCIDENTALLY CONVEY A MESSAGE.

The Ninth Circuit analogized the vending of merchandise, which incidentally carried a message, to solicitation or fund raising. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980) and *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 788-789 (1988).

Such an analogy ignores the facts of the instant case. The sidewalks of San Francisco are littered with commercial sales which may or may not incidentally carry a message. Vendors are engaging in commercial activity, not in solicitation. Nor is their primary purpose the communication of ideas as it is with solicitation. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* 473 U.S. 788, 797-798 (1985) (quoting *Schaumburg*, 444 U.S. at 632). The sidewalk vendors are engaged in merchandising.

> "[S]oliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views . . . and for the reality that without solicitation the flow of information and advocacy would likely cease."
>
> . . . "[C]haritable appeals for funds, on the street or door to door, involve a variety of speech inter-

> ests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Id.*

The freedom to solicit funds as a protected speech under the First Amendment is *not* the issue in this case. The freedom to engage in sidewalk sales free from content neutral regulation is the issue.

The ability to control commercial sales which incidentally bear a message is a proper exercise of the police power of a municipality. The Supreme Court observed in *United States v. O'Brien*, 391 U.S. 367, 376 (1968) that there is not a limitless variety of conduct which can be labeled speech whenever the conduct incidentally expresses an idea. Further, the Court established a four-prong test of the validity of the government regulation when speech and non-speech elements are combined in the same course of conduct. *United States v. O'Brien*, 391 U.S. at 377.

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*

The Ninth Circuit recognized that the San Francisco peddling ordinance met three of the four prongs of the *O'Brien* test. *Gaudiya Vaishnava Soc. v. San Francisco*, 952 F.2d 1059, 1065 (9th Cir. 1992). The Ninth Circuit held that the ordinance was not the least restrictive alternative for advancing the interests sought to be regu-

lated by San Francisco because the police chief is vested with "unbridled" discretion. The Ninth Circuit opined that regulations controlling the police chief would have met the fourth prong of *O'Brien*.

Yet in *United States v. Albertini*, 472 U.S. 675, 689 (1985) the Supreme Court found that the fourth prong of *O'Brien* did not mean that the court should second guess the government in determining the most appropriate means for promoting the government's interest. *United States v. Albertini*, 472 U.S. at 688-689.

Indeed, permit issuing authorities are vested with sound discretion in the issuance of permits. Here, where the issue is a question of *permits to engage* in sidewalk *sales*, the question does not rise to the significance of a pure speech issue under the First Amendment.

> "Delegation of power to a municipal officer to refuse permits to businesses which are subject to police regulation is constitutional, and it is presumed that such authorities have not acted arbitrarily but in the exercise of sound discretion. [Citations.] The granting of discretionary power not restricted by specific standards to confer or deny licenses is to be upheld where the licensed activity, because of it's potentially objectionable character (e.g., traffic obstruction), may be regulated or restricted to certain localities."

San Francisco Street Artists Guild v. Scott, 37 Cal.App.3d 667, 674 (1974). There is no question that sidewalk vending is properly subject to regulation pursuant to the police power of the municipality. A vendor cannot avoid such proper and necessary regulation by merely exhibiting or appending a non-commercial message on the vended item.

In San Francisco, as in any other city, left unregulated, the proliferation of clutter and litter associated with street vendors, create a traffic hazard for pedestrians. The police power of the municipality is essential to control this hazard along with the types of merchandise being vended which could pose a threat to public health, safety or welfare. The peddling ordinance does not impinge upon any First Amendment freedom of speech, it protects the public. Having satisfied all four prongs of *O'Brien*, the peddling ordinance should be found to pass constitutional muster.

II. THE INSTANT ORDINANCE DOES NOT IMPINGE UPON FIRST AMENDMENT FREEDOM OF SPEECH.

The Ninth Circuit improperly has expanded the protection of the First Amendment freedom of expression to speech which heretofore has not been so protected. Commercial merchandising is the only activity regulated by the San Francisco peddling ordinance. The ordinance specifically excludes sales clearly associated with expression from its application.

Conduct which raises income for charitable and religious organizations is subject to income tax if the income is derived from a trade or business which is unrelated to the purpose in granting the organization tax exempt status. 26 U.S.C. section 511 (a)(1). Similarly, the Supreme Court in *U.S. v. American Bar Endowment*, 477 U.S. 105, 110, 119 (1986) found that the tax exempt status of a tax exempt organization did not extend to activities which are not substantially related to the tax exempt status of the organization. Merchandizing by charitable and religious organizations which profess to advance a cause is wholly unrelated to the purpose for which the organization ex-

ists. Rather, the purpose of the sale of merchandise is to generate income.

In *Veterans of Foreign Wars, Department of Michigan v. Commissioner of Internal Revenue,* 89 T.C. 7 (1987), the court found that the sale of Christmas cards by the organization to generate income was subject to taxation. The Internal Revenue Code distinguishes conduct related to the purpose of an organization which is exempt from taxation and conduct which is unrelated to the organization and subject to regulation by taxation. The Internal Revenue Code distinguishes the operation of a trade or business which is tangentially connected to freedom of speech in that it is conducted by a charitable organization and labels such an activity commercial and subject to taxation. Surely San Francisco is entitled to make the same distinction and require the operation of a trade or business, the purpose of which is to generate revenue for the charitable organization, to obtain a peddlers license. Such restriction is far less taxing on the organization than the control imposed by the Internal Revenue Service. Since the Internal Revenue Service can distinguish commercial activity by charitable and religious organizations for regulation under the tax code, there is no reason to prevent local governments from doing so as well in the exercise of its police power.

Similarly, in *City of Lakewood v. Plainer Publishing Co.,* 486 U.S. 750, 760-761 (1988), the Supreme Court distinguished the ability by government to regulate conduct associated with expression and conduct not so associated.

> . . . [L]aws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of expression or the word about to be

spoken, carry with them little danger of censorship." *Id.*

Indeed, the Supreme Court distinguished the newspaper vendor from the soda vendor who engages in speech.

> "Newspapers are in the business of expression, while soda vendors are in the business of selling soft drinks. Even if the soda vendor engages in speech, that speech is not related to the soda; therefore preventing it from installing machines may penalize unrelated speech, but will not directly prevent that speech from occurring. In sum, a law giving the Mayor unbridled discretion to decide which soda vendors may place their machines on public property does not vest him with frequent opportunities to exercise substantial power over the content or the viewpoint of the vendor's speech by suppressing the speech or directly controlling the vendors ability to speak." *Id.*

The analogous reasoning applies to the instant case. Those selling books, pamphlets, buttons, bumperstickers, posters or other types of items that have no commercial purpose other than to communicate a message do not need to obtain a peddler's permit. The business of speech and the communication of ideas is unaffected by the San Francisco ordinance. The peddler engaged in selling merchandize is in the business of selling, not communicating. The speech associated with the sale of the banana or the T-shirt is the same type of speech associated with the sale of the soda distinguished in *Lakewood* from the sale of newspapers.

Since San Francisco can control the location of a soda vendor who incidentally engages in speech, there is no justification to distinguish the T-shirt vendor who inci-

dentally engages in speech. The activity is the same commercial venture; only the type of merchandise differs.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to accept the petition for writ of certiorari filed by the City and County of San Francisco and to reverse the judgment of the United States Court of Appeal for the Ninth Circuit in this case.

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